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AUTHOR Labunski, Richard
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ABSTRACT

Serious constitutional problems arise when the contempt power of judges clashes with other compelling interests such as those of the First Amendment. The "collateral bar" rule--which requires that court orders, even those later determined to be unconstitutional, must be complied with until amended or vacated--in effect, calls for journalists either to accept almost certain conviction for contempt, or to obey the order, seek review, and forfeit, temporarily or permanently, the First Amendment rights they seek to exercise. Courts in various jurisdictions have looked at the same history of the collateral bar rule and the First Amendment, and come to different conclusions on how they ought to be balanced, resulting in inconsistency and confusion. United States versus "Privdence Journal" would have provided the first opportunity for the Supreme Court to consider directly the applicability of the collateral bar rule in a case where an unconstitutional prior restraint order had been issued against a news organization. The effectiveness of the courts depends on their ability to have orders obeyed. But if an invalid order prevents the exercise of First Amendment rights, and the appeal cannot be heard before the circumstances require public dissemination, journalists must be able to challenge the order when appealing a contempt conviction. Such a collateral bar challenge shows no more disrespect for the law than an invalid court order restricting freedom of speech and press. (Two hundred thirteen notes are included.) (MS)

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U.S. v. Providence Journal: The First Amendment and the Constitutionality of Enforcing Unconstitutional Orders

by

Richard Labunski
Assistant Professor
School of Communications
University of Washington
Seattle, WA 98195

(206) 543-2660

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U.S. v. Providence Journal: The First Amendment and the Constitutionality of Enforcing Unconstitutional Orders

I. Introduction

The contempt power of judges is as awesome as it is indispensable. Nowhere in our political system can an individual exercise comparable authority as when a judge holds someone in criminal contempt.[1] By finding someone guilty of contempt and ordering that person jailed or fined, a court combines the roles of grand jury, prosecutor, and judge. Subsequent appeals or reconsideration may modify or overturn the contempt order, but these do little to compensate the alleged contemnor who may have already spent time behind bars.[2]

An essential element of a democratic society is an independent judiciary that can protect individual liberty. Judges must be able to enforce their decisions and vindicate the authority of the court by punishing those who disobey judicial orders.[3] Without the authority to force compliance with their orders, courts would be merely advisory and could not function. But serious constitutional problems arise when the contempt power clashes with other compelling interests such as those of the First Amendment.

Freedom of speech and press enjoys a near-sacred position in our system. Any statute, court order, or administrative policy that restricts its exercise is subject to maximum judicial scrutiny and must clear numerous constitutional barriers. While First Amendment freedoms enjoy a "preferred position," other constitutional rights, such as those to a fair trial, are also indispensable to a free society.[4] When such fundamental rights clash, judges must weigh the competing interests and determine how each is best preserved. The "balancing" that must be done is often difficult for the most conscientious judge.

The issues become even more complicated when judges illegally restrict the exercise of First Amendment rights by issuing invalid orders, then attempt to force compliance under threat of contempt. The most common circumstance in which unconstitutional orders are issued against the press is when judges restrain journalists in advance of publication in a fair trial/free press context. The Supreme Court has declared that "any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity"[5] and will be tolerated only under the most limited circumstances.[6] Yet judges, arguing that restraints on publication are sometimes necessary to protect the rights of the parties and the authority of the court, issue such orders even while recognizing the likelihood they will be overturned on appeal.[7]

The journalist against whom a constitutionally infirm order is directed must choose among several options: either comply by not publishing and suffer a "chilling" if not "freezing" of First Amendment rights; comply but try to get the order vacated or modified expeditiously on appeal, hoping that such relief will come before the time of publication; or disobey the order and suffer the consequences such as a contempt conviction that can carry severe penalties.[8] The decision is complicated by several factors, the most significant of which is the "collateral bar" rule. Despite severe criticism of the application of the rule in First Amendment cases,[9] it is recognized in many states and has been given substantial blessing by the Supreme Court and the Fifth Circuit Court of Appeals.[10]

The rule requires that court orders, even those later determined to be an unconstitutional, must be complied with until amended or vacated.[11] It also requires that once a publisher violates the order, he loses the right to "collaterally" challenge the order's constitutionality as a defense to a contempt charge. The rule, in effect, requires journalists to either accept almost certain conviction for contempt, or obey the order, seek review, and forfeit, temporarily or permanently, the First Amendment rights they seek to exercise.[12] The rule places in the hands of judges the power to force by threat of contempt at least temporary obedience to invalid orders that should never have been issued. Depending on the nature of the case and the jurisdiction, application of the collateral bar rule and the consequences for disobeying even invalid orders can vary substantially from severe penalties to complete vindication.

Many states have never clearly defined the circumstances under which a judicial order which unconstitutionally restricts the exercise of First Amendment rights may be disobeyed.[13] Several jurisdictions have held that a party subject to an order that constitutes a "transparently invalid" prior restraint on *pure* speech may challenge the order by violating it, and collaterally attack the validity of the order on appeal.[14] Yet other courts have allowed no exceptions to the collateral bar rule and

upheld contempt citations based on unconstitutional orders.[15]

The collateral bar rule in prior restraint cases is different in several respects from the more accepted practice of willful violation of a statute that is later declared unconstitutional on appeal and results in the reversal of conviction for violating it. The Supreme Court has defended the collateral bar rule by saying that "no man can be judge in his own case, however exalted his station, however righteous his motives."[16] The rule is thought to foster respect for the courts and the judicial system.[17] Yet disrespect for the law is encouraged when a defendant challenges a law's constitutionality by violating it. The benefit of identifying unconstitutional laws is thought to be worth the potential harm to the legitimacy of the judicial system. An argument could be made that society is as well served by those who defy unconstitutional injunctions.[18]

An example of how disobeying an injunction differs from willful violation of a statute can be seen by comparing *Walker v. Birmingham,*[19] and *Shuttlesworth v. City of Birmingham,*[20] both of which arose from the same events.[21] Petitioners in *Walker* disobeyed an injunction forbidding them from holding marches in Birmingham to protest racial discrimination in that city. When they marched without seeking modification or repeal of the injunction, they were convicted of criminal contempt which the Supreme Court court upheld even while strongly suggesting that the injunction and the ordinance on which it was based were unconstitutional. The petitioners were also prosecuted and convicted of violating the ordinance. In *Shuttlesworth,* the Supreme Court held it to be unconstitutional on its face as an unwarranted prior restraint on the exercise of free speech. It reversed the convictions and noted that its past decisions "have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license."[22] The difference was the type of authority being defied. In one case, an order from a court restricting exercise of First Amendment rights; in the other, an invalid statute on which the court order was based.

Judicially recognized exceptions to the collateral bar rule further undermine its rationale. If the principle is that respect for the courts requires that one not have the right to decide which orders are to be obeyed, then recognition of *any* exceptions to the collateral bar rule encourages those faced with a potentially unconstitutional order to decide if the judicial order is frivolous or the issuing court lacks jurisdiction.[23]

The circumstances under which prior restraint orders are issued raises additional questions about the validity of the collateral bar rule. Rarely are news organizations able to contest in a full hearing, complete with all procedural rights, an injunction restricting coverage of a pending criminal trial. The trial judge, concerned over prejudicial publicity that makes impaneling an impartial jury difficult, often issues an ex parte restraining order that reporters must obey. While such summary powers are legitimate tools of the court, they prevent journalists from getting their "day in court" before being ordered to forfeit some of their First Amendment rights. Under such circumstances, a collateral attack on appeal would afford the first opportunity for a thorough consideration of the constitutional claims of the journalist.

The issues are more complicated when there is an adversarial hearing held in advance of the restraining order that provides at least some procedural rights. In order to obtain a prior restraint order, the party seeking the order must advance a significant interest to justify the restraint on speech. That there are sufficiently compelling governmental interests to issue the injunction doesn't necessarily indicate there are sufficient interests in preventing those to whom such an order is directed from collaterally attacking the order on appeal.[24]

Those who carefully examine *Nebraska Press Association v. Stuart,*[25] one of the the Supreme Court's most important cases on prior restraint, may come to the conclusion that the three-step test established in the opinion would prevent *any* prior restraint order in a free press/fair trial context from being sustained on appeal.[26] The issue, then, is not whether journalists will eventually win on appeal, which is most likely, but what to do about the restraining order that may prevent them from publishing the news in a timely manner.[27] If they assume that the prior restraint order will be overturned, they may choose to disobey the order and challenge its constitutionality while appealing the contempt conviction. They know that if the order is not violated before press time, the news that had been restrained may never be published. News gets old very quickly and the public often has an interest in only the most current news events. A restraining order that may preserve the status quo

in non-First Amendment cases has a more drastic effect on news-gathering where journalists prevented from publishing for even brief periods of time are deprived of their First Amendment rights.[28]

Despite the formidable test in *Nebraska Press Association*, there is evidence to suggest that since *U.S. v. Dickinson*, the 1972 case decided by the U.S. Court of Appeals for the Fifth Circuit that upheld the collateral bar rule, many newspapers have been appealing restraining orders rather than disobeying them even if they suspect the orders are invalid. This reversed the pre-*Dickinson* practice of disobeying orders and attacking them collaterally.[29] Other news organizations are giving a liberal interpretation to some sections of *Dickinson* and *Walker* by assuming that they must simply *initiate* the appeals process prior to disobeying the order. Taking whatever steps toward direct appeal prior to press time may increase the chances of successful collateral attack.[30] In some jurisdictions, a pending, and not necessarily successful appeal, may be all that is necessary. But in many courts, the issues are unsettled.

One area where the Supreme Court appears to have severely limited the application of the collateral bar rule is when gag orders prohibit publication of information obtained in open court.[31] The Supreme Court held in *Nebraska* and two other cases, *Oklahoma Publishing Co. v. District Court*[32] and *Cox Broadcasting Corp. v. Cohn*,[33] that truthful reporting by the press of events that occur in open court is protected by the First Amendment as "pure speech." Therefore, under such circumstances it seems appropriate for journalists to disobey a gag order against publication of material obtained in open court without forfeiting the right to challenge its validity.[34]

While the First Amendment enjoys unparalleled reverence in our system, it is not absolute and must be balanced with other rights such as those to a fair trial.[35] Courts in various jurisdictions have looked at the same history of the collateral bar rule and the First Amendment, and come to different conclusions on how they ought to be balanced.

II. The bizarre ending of *Providence:* The Supreme Court leaves issues unresolved.[36]

When the Supreme Court granted certiorari in *United States v. Providence Journal*,[37] it had the opportunity to develop standards related to the application of the collateral bar rule in First Amendment cases. The Court needed to settle differences not only among the states, but also resolve a direct conflict between the First Circuit Court of Appeals, which rejected the rule in *Providence*, and the Fifth Circuit of Appeals, which enthusiastically embraced the collateral bar rule in *Dickinson*. Instead, the Court upheld the First Circuit's decision in *Providence* on procedural grounds, and thus the conflict among states and federal circuits remains.

On May 2, 1988, the Supreme Court held in *U.S. v. Providence Journal*[38] that the Solicitor General had not granted the required authorization to the special prosecutor who brought the government's appeal. The Court dismissed the writ of certiorari for want of jurisdiction.[39]

Federal courts have long held that they have the inherent authority to appoint private attorneys to prosecute disobedience of court orders. Without such authority, courts would be forced to rely on the executive branch for prosecution of contempt cases.[40]

After the First Circuit Court of Appeals reversed the judgment of contempt, the special prosecutor sought authorization from the Solicitor General to appeal the case to the Supreme Court. On July 2, 1987, the Solicitor denied that authorization.[41] Even without the Solicitor General's approval, the special prosecutor appealed the case, and the Supreme Court granted certiorari and heard oral argument. Attorneys for the Providence Journal subsequently argued that the special prosecutor was required to obtain authorization, had failed to do so, and therefore could not proceed before the Supreme Court.[42] The Court agreed and dismissed the writ of certiorari.[43]

The Court had to consider whether in cases in which the United States has an "interest," it is the courts or the Attorney General who authorizes an appeal.[44] The special prosecutor claimed that his appearance before the Supreme Court was necessary for the vindication of the District Court's authority. The Supreme Court recognized the importance of special prosecutors in contempt cases.[45] But it also noted that the Solicitor General and the special prosecutor had disagreed with respect to whether the case presented issues worthy of review by the Supreme Court.

Such disagreements, which the Court said are not uncommon, must not interfere with the judiciary's ability to protect itself.[46] The Supreme Court recognized, however, that in *Providence* the Court of Appeals had *reversed* the district court's judgment of contempt. Thus, the Court of Appeals determined that the authority of the district court did not require vindication.[47] If the appellate court had affirmed the contempt conviction, and the Supreme Court granted a petition for certiorari by the alleged contemnor, the Solicitor General would need to be consulted and his authorization or participation obtained to oppose the petition and defend the judgment.[48]

It was ironic that the Solicitor General, who at first argued that the United States did not have an "interest" in the case under Section 518 (a), eventually expressed the interest of the government in the litigation in an amicus brief filed in support of the position taken by the special prosecutor.[49]

The Court's failure in *Providence* to reach the substantive issues leaves unanswered many important issues about the power of courts and the rights of journalists to disobey unconstitutional orders. It is likely that the Court, having granted certiorari in *Providence*, would be willing to accept for review a case presenting similar questions in the near future.[50]

III. The constitutionality of enforcing unconstitutional orders.

While contempt predates the Constitution, and has been subjected to interpretation in common law and limitation by statute, the issue of the validity of contempt citations based on unconstitutional orders is a relatively recent phenomenon.[51] The Supreme Court's 5-4 decision in *Walker v. Birmingham* [52] in 1967 is often cited as authority for the principle that even unconstitutional orders must be obeyed until overturned on appeal. It also has been interpreted as providing several exceptions to the collateral bar in First Amendment cases.

In *Walker*, the Supreme Court upheld the conviction of civil rights activists who disobeyed an Alabama circuit court judge's order forbidding street parades without a permit and were found guilty of contempt.[53] The petitioners attacked the temporary injunction as "vague and overbroad," and that it "restrained free speech," which the Alabama judge rejected.[54] A key issue for the Alabama courts, and later the Supreme Court, was that petitioners had not filed any motion to vacate the injunction until after the parades were held and no effort was made to comply with the judge's order by applying for a permit from the city commission.

In sustaining the contempt convictions, the Supreme Court upheld the principle that even unconstitutional orders must be obeyed. The Court recognized the strong interest of state and local governments in regulating the use of streets and other public places.[55] The Court held that Alabama courts had jurisdiction over the petitioners and subject matter in this case, and that "this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity."[56] This language is especially important because several state and federal courts have interpreted *Walker* to mean that if the injunction *is* transparently invalid or has only a frivolous pretense to validity, it can be disobeyed and challenged on appeal for contempt conviction. In trying to apply *Walker*, courts have given various definitions to transparent invalidity, sometimes requiring certain procedures be followed by courts issuing restraining orders against the press before the collateral bar rule can be invoked. Moreover, the statement that the Alabama courts had jurisdiction over the petitioners in *Walker* has been interpreted by some appellate courts to mean that if the order was an unconstitutional prior restraint on free speech, the trial court lacked jurisdiction to issue it.[57]

The Supreme Court did imply in *Walker* that the injunction and ordinance unconstitutionally restrained the exercise of First Amendment rights, and said that the breadth and vagueness of the injunction itself "would also unquestionably be subject to substantial constitutional question. But the way to raise that question was to apply to the Alabama courts to have the injunction modified or dissolved."[58]

Because it was a decision of the U.S. Supreme Court directly focused on the issue of collateral attack, *Walker* cannot be ignored by lower courts applying the collateral bar rule in their jurisdictions. But *Walker's* progeny demonstrated the willingness of lower court judges to examine the same language and come to different conclusions. In *Walker*, the Supreme Court sharply criticized the methods used by the petitioners and upheld the requirement that judicial orders be respected. But it implicitly recognized several important exceptions to the collateral bar rule, namely transparent invalidity and lack of

jurisdiction, that would encourage courts in subsequent cases to allow collateral attack where the content of the order or the jurisdiction of the court could be challenged. Lower courts, in deciding whether to allow collateral attack, have focused either on the statements in *Walker* that even invalid injunctions must be obeyed, or on the implicit statement that transparently invalid orders or those made by courts lacking jurisdiction cannot support a contempt conviction. While appearance is sometimes different from substance, it seems that some lower courts came first to the decision whether to allow collateral attack, and then second, searched for language in *Walker* to support the decision.[59]

The Supreme Court's commitment to the collateral bar rule was not a recent phenomenon. In 1922, the Court had accepted and "fully approved" in *Howat v. Kansas*[60] the rule established by the Kansas Supreme Court that injunctions must be obeyed:

"An injunction duly issuing out of a court of general jurisdiction...must be obeyed...however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."[61]

While the Supreme Court expressed sympathy for the petitioners' "impatient commitment to their cause," in *Walker*, it held that "respect for the judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."[62] The Supreme Court mentioned several times that the petitioners had opportunities for appeal prior to the scheduled parade which they did not pursue. The implication is that *Walker* requires no more than an attempt to appeal a void restraining order up to the time the constitutionally protected action is planned.[63] If that interpretation is correct, then collateral attack would be still available as a means of testing the void order. The Court indicated that if a proper appeal had been made and was not expeditiously considered by an Alabama court, the issues would be different:

"This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims. But there is no showing that such would have been the fate of a timely motion to modify or dissolve the injunction. There was an interim of two days between the issuance of the injunction and the...march....The injunction had been issued ex parte; if the court had been presented with the petitioners' contentions, it might well have dissolved or at least modified its order in some respects. If it had not done so, Alabama procedure would have provided for an expedited process of appellate review."[64]

In a strong dissent joined by Justices Brennan and Fortas, Chief Justice Warren argued that disobeying a void injunction is constitutionally equivalent to violating an unconstitutional statute. He did not accept the argument that an exception to the collateral bar rule would prevent the courts from functioning.[65]

While the Court in *Walker* identified exceptions to the collateral bar, some courts have rejected the application of such exceptions and have embraced the principle that unconstitutional orders must be obeyed. Nowhere has that part of *Walker* been upheld with more reverence than in *U.S. v. Dickinson*. The *Dickinson* rule stands for the proposition that contempt citations resulting from disobeyance of unconstitutional orders are valid. Chief Judge Brown, who wrote the opinion in *Dickinson*, called the case a "civil libertarians' nightmare" with a classic confrontation between "two of the most cherished policies of our civilization-- freedom of the press...and the right of the accused to a fair and impartial trial."[66] What he did not note is that *Dickinson* interrupted steady progress toward judicial consensus on the issue of collateral attack in First Amendment cases. Prior to *Dickinson*, a number of state and federal courts had been moving towards allowing exceptions to the collateral bar rule in First Amendment cases. Judges writing post-*Dickinson* cases have either felt bound by its dictates or have spent many pages explaining why it is not controlling.

Two newspaper reporters were fined by the U.S. District Court for the Eastern District of Louisiana after they violated an order not to report on the details of a pre-trial hearing involving a man

accused of conspiring to murder the mayor of Baton Rouge. The accused, Frank Stewart, a VISTA volunteer active in civil rights endeavors on behalf of the black community, alleged that the state court prosecution was "completely groundless and intended solely and exclusively to harass the accused in order to suppress his exercise of First Amendment rights."[67] He sought injunctive relief from the U.S. District Court which initially declined to restrain the state court prosecution,[68] but was reversed by the Fifth Circuit.[69]

During the second hearing, the judge issued an order to keep newspaper reporters from discussing the details of the hearing:

"It is ordered that no, no report of the testimony taken in this case today shall be made in any newspaper or by radio or television, or by another other news media. This case will, in all probability, be the subject of further prosecution....In order to avoid undue publicity which could in any way interfere with the rights of the litigants...there shall be no reporting of the details of any evidence taken the course of this hearing today."[70]

The judge did say he would allow the press to report "the fact that a hearing has been held," but he added "it's obvious that the testimony here today could impede another court in its progress toward selecting a jury in this case if such became necessary."[71] The two reporters, with "admitted knowledge" that their actions violated the terms of the order, wrote articles for their newspapers summarizing the day's testimony in detail.[72] Following a hearing, they were found guilty of criminal contempt and fined $300.[73]

The Fifth Circuit, after discussing the historical clash between First Amendment and Sixth Amendment rights, concluded that the judge's order was an unconstitutional prior restraint.[74] It then turned to the validity of the contempt citation and the question whether "a person may with impunity knowingly violate an order which turns out to be invalid."[75]

The court began with what it called "a well established principle" in proceedings for criminal contempt that "an injunction duly issuing out of a court having subject matter and personal jurisdiction *must be obeyed*, irrespective of the ultimate validity of the order."[76] And the court added, "People simply cannot have the luxury of knowing that they have a right to contest the correctness of the judge's order in deciding whether to willfully disobey it....Court orders have to be obeyed until they are reversed or set aside in an orderly fashion."[77] The Fifth Circuit cited *Walker* as the primary authority for its holding, and using language from that case, wrote that:

"Absent a showing of 'transparent invalidity' or patent frivolity surrounding the order, *it must be obeyed* until reversed by orderly review or disrobed of authority by delay or frustration in the appellate process, regardless of the ultimate determination of constitutionality, or lack thereof."[78]

Judge Brown, who wrote *Dickinson*, acknowledged that the "inviolability" of judicial orders is unique among governmental commands. When legislators or executive agencies have transgressed constitutional or statutory grounds, their mandates, according to Judge Brown, need not be obeyed.[79] Violators obviously run the risk of criminal sanctions if they are wrong about the validity of the law or order they disobey, but if the directive is invalid, they may disregard it with "impunity."[80] In fact, the court recognized that in some situations intentional disobedience may be the only way of determining the constitutionality of the order.[81] Likewise, Congress cannot hold someone in contempt if its demand for information on which the contempt citation was based was "constitutionally infirm."[82] To Judge Brown, it is, significantly, only the orders of judicial authorities which must be "tested in the courts before deliberate transgression can be excused on an eventual determination that the order was invalid."[83]

In an eloquent statement of the rule, Brown explained why such a requirement is necessary:

"The criminal contempt exemption requiring compliance with court orders, while invalid non-judicial directives may be disregarded, is not the product of self-protection or arrogance of Judges. Rather it is born of an experience-proved recognition that this rule is essential for the system to work. Judges, after all, are charged with the final responsibility to adjudicate legal disputes....The problem is unique to the judiciary because of its particular role. Disobedience to a legislative pronouncement in no way interferes with the legislature's ability to discharge its responsibilities (passing laws). The dispute is simply pursued in the judiciary and the legislature

is ordinarily free to continue its function unencumbered by any burdens resulting from the disregard of its directives.....On the other hand, the deliberate refusal to obey an order of the court without testing its validity through established processes requires further action by the judiciary, and therefore directly affects the judiciary's ability to discharge its duties and responsibilities."[84]

And quoting from *Gompers*, Judge Brown held that "while it is sparingly to be used...the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory."[85]

The court in *Dickinson* identified three conditions that when met result in an order that must be obeyed until overturned or revoked:

1) the court issuing the injunction must enjoy subject matter and personal jurisdiction over the controversy;

2) adequate and effective remedies must be available for orderly review of the challenged ruling; and

3) the order must not require an irretrievable surrender of constitutional guarantees.[86]

The court accepted the first condition without comment. In considering the second, the court cited *Walker* and noted that there was a two-day interim between the issuance of the injunction and the march, during which time the petitioners could have made some effort to have the injunction modified.[87]

The court acknowledged that when the statements enjoined are newsworthy, this condition presents some difficult problems. "Timeliness of publication is the hallmark of 'news' and the difference between 'news' and 'history' is merely a matter of hours."[88] Thus, the immediate availability of orderly review may determine whether the news organization obeys or disobeys the order. But unless the appellate process was, in the words of Judge Brown, "deliberately stalled," which it clearly wasn't in the *Dickinson* case, news people may not violate an order with impunity "simply because immediate decision is not forthcoming, even though the communication enjoined is 'news.'[89] The court suggested that journalists do not have special privileges in this area of the law:

"Of course the nature of the expression sought to be exercised is a factor to be considered in determining whether First Amendment rights can be effectively protected by orderly review so as to render disobedience to other unconstitutional mandates nevertheless contemptuous. But newsmen are citizens, too. They too may sometimes have to wait. They are not yet wrapped in an immunity or given the absolute right to decide with impunity whether a Judge's order is to be obeyed or whether an appellate court is acting promptly enough."[90]

On the third point, the Fifth Circuit held that forcing compliance with a judicial order later determined to be invalid is not an irrevocable and permanent surrender of a constitutional right. The court gave an example of where a witness could not be held in contempt for refusing a court order to testify if the underlying order violates the Fifth, Fourth, or perhaps First Amendment rights.[91] "The rationale of these cases is that once the witness has complied with an order to testify he cannot thereafter retrieve the information involuntarily revealed, even if it subsequently develops that compelling the testimony violated constitutional rights. In such a predicament, the damage is irreparable. No remedies are available which can effectively cure the constitutional deprivation after the order has been unwillingly obeyed."[92] In *Dickinson*, none of those factors was present.[93] In fact, the district court ordered that "information be withheld -- not forcibly surrendered -- and accordingly, compliance with the Court's order would not require an irrevocable, irretrievable or irreparable abandonment of constitutional privileges."[94]

The court of appeals remanded the case to the district court for a determination of whether the contempt citation should stand considering that it had determined the original order to be unconstitutional. The trial judge left the contempt citations unchanged,[95] and the court of appeals sustained the judge's ruling.[96]

After remand, the trial judge had the opportunity to reverse the contempt convictions. That he refused was partially due to his irritation with the way the newspaper handled coverage of the court's action against it. His views may be representative of the attitude of other judges who deal with news organizations.

Judge West held that it would be "too great a contradiction" on the one hand, to recognize the principle approved by the court of appeals that "having disobeyed the Court's decree, they must, as civil disobeyers, suffer the consequences," and at the same time hold that because the order, "issued in utter good faith by this Court, was subsequently held by another Court to be constitutionally infirm, the defendants should not suffer the consequences."[97]

Judge West held that his assumption that a valid order was disobeyed was not the sole reason for the contempt citation. It was partially due to the method used by the newspaper to announce its disobeyance:

"These defendants...after violating the order, contemptuously announced to the public, at the end of their published articles, that they had published this story despite an order...ordering them not to do so. It was primarily this public display of utter contempt for this Court's order that prompted the contempt citation....At the time of the contempt citation, it was not the validity vel non of the Court's order that was primarily at issue. It was the intentional, willful, flagrant and contemptuous disregard of the Court's order before in any way attempting to have the order, which was obviously issued in good faith, judicially reviewed."[98]

If the contempt citation was sustained because of the method the newspaper used to announce its disobeyance, it seems close to constructive contempt which the Supreme Court has held cannot infringe upon the First Amendment without a showing that the publication posed a "clear and present danger to the administration of justice."[99] The implication is that had the newspaper either not announced its disobeyance, or done so less flagrantly, Judge West may have set aside the contempt citations. The issue is important because the court of appeals upheld Judge West's decision not to set aside the contempt citations and therefore gave tacit approval to the principle that newspapers should not communicate information of this nature to its readers.[100]

Flaunting in print disobedience to a judge's order is a form of journalistic arrogance that serves neither the interests of courts nor journalists. The legitimacy granted courts in our system is in many respects fragile and rests largely on psychological grounds. The importance of public acceptance of judicial directives is indicated by the harshness of penalties for criminal contempt. Courts strongly argue that the contemnor in the case at hand and all others who would disobey court orders must be punished, and only through such punishment is an affront to the court's authority effectively redressed. The punitive nature of criminal contempt clearly demonstrates that deterrence is one of its primary goals.

Journalists abuse their public trust when they disobey judicial orders, then proudly proclaim their courage and independence in print for the publicity, and not news value of the story. It is a form of journalistic pandering that in obscenity cases, has in and of itself, been determined to be a crime punishable by a prison sentence.[101] While stories that seek to capitalize on court/press confrontations enjoy the same First Amendment protection granted to articles on other subjects, they unnecessarily aggravate tensions between the press and courts and may make it more likely that the judge's next encounter with the press will demonstrate those heightened tensions. Nevertheless, there may be circumstances where a judge's effort to muzzle the press by issuing a prior restraint order that requires widespread public condemnation. But journalists could sometimes exercise more discretion.[102]

The Fifth Circuit's strong endorsement of the collateral bar rule in *Dickinson* indicated that at least in that jurisdiction, the *Dickinson* rule would be vigorously applied to any case presenting similar circumstances. But a year later, the Fifth Circuit was not so decisive and left some doubt as to the applicability of the rule in cases where the violated order was ambiguous. In *U.S. v. CBS*,[103] the court struck down as an unconstitutional prior restraint verbal orders prohibiting the publication of sketches made outside a courtroom, but declined to address the question of whether the contempt citation based on that order should be sustained.[104]

Prior to the trial of eight persons accused of conspiring to disrupt the Republican National Convention in 1972 in Miami, a U.S. district court judge in Florida issued an order against CBS prohibiting the network from broadcasting sketches of the courtroom regardless of where the sketches were made.[105] At a pre-trial hearing, the trial judge announced orally that "no sketches in the courtroom would be permitted to be made for publication."[106] CBS's artist, in following the judge's instructions, took no sketch materials into the courtroom, but did enter to observe the proceedings. After two hours she left and began

sketching outside in the hall. When the judge learned of this activity, he called both the sketch artist and the CBS reporter into this chambers, and confiscated the sketches. The judge then issued another verbal order. While no court reporter was present during the meeting, the judge later said that he "made explicit the direction that no sketches for publication of proceedings in the courtroom or its environs were to be made, even though such sketches were made not in the courtroom or its environs but from memory."[107]

After this order, the artist left the courthouse and later sketched trial participants from memory based on her observations both inside and outside the courtroom. Four of the sketches were televised on the CBS Morning News. A few weeks later CBS was adjudged guilty of contempt for having defied the judge's order.

The court of appeals had to first consider the validity of the order banning the publication of sketches, regardless of where they were made. While it recognized the need for trial judges to take "strong measures" in cases where there is a great deal of publicity, the court held before a prior restraint may be imposed, there must be "an imminent, not merely likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."[108]

The government, citing instances where the presence of cameras and the actual televising of a trial had prevented a defendant from getting a fair trial, argued for a ban in some cases on sketching as well.[109] The court of appeals refused to equate sketching with the actual broadcasting of a trial, holding that sketching requires only a "writing instrument and sketch pad and can be done quite unobtrusively, or even, as in this case, from memory completely outside the courthouse."[110] And the court noted that no state or federal court has prohibited the publication of sketches.[111] In striking down the judge's order, the court of appeals held that "the total ban on the publication of sketches is too remotely related to the danger sought be avoided, and is, moreover, too broadly drawn to withstand constitutional scrutiny."[112] And it was further unwilling to "condone a sweeping prohibition of in-court sketching when there has been no showing whatsoever that sketching is in any way obtrusive or disruptive."[113]

The court of appeals had to decide whether, consistent with *Dickinson*, the contempt citation should stand even though the order on which it was based was determined to be unconstitutional.[114] Complicating the appeal was the fact that the original orders against CBS were verbal in nature, and there was a factual question as to the exact content of these unrecorded orders. In the words of the court of appeals, the "judge had to determine whether what he said was said was really said. He obviously could not be a witness and a judge in the same proceeding."[115] The court held that the "demands...and appearance of justice" require a trial by another judge.[116]

Rather than discussing the relevance of the circuit's own *Dickinson* rule, and providing some guidance as to its application, the court, in a few words, simply reversed the contempt conviction and remanded the case for a new trial before a different judge. The court stated: "we leave open for consideration by the court below...the advisability of pursuing the contempt action in view of our determination that the verbal orders issued are unconstitutional."[117]

Having moved from *Dickinson's* strong statement upholding the collateral bar rule, to *CBS*, where the court declined to address the issue of collateral attack, the Fifth Circuit a few years later upheld a contempt conviction by allowing a trial judge substantial latitude to impose criminal penalties even when the underlying legal issues had yet to be resolved. In *In re Timmons*,[118] decided in 1979, the court upheld 30-day criminal contempt convictions against individuals who refused to vacate a federal wildlife refuge to part of which they claimed they held legal title. The judge issued an order that they vacate the land, which they refused to do.[119] The appellants challenged the court's decision to convict them of criminal contempt, rather than civil contempt which would have ended when the disobedience ended. The court of appeals rejected the contention that the contempt conviction is a "facet of the original cause of action," and held that the contempt conviction was a separate cause of action to punish disobeyance of the judge's order.[120]

The court determined that an order of civil contempt cannot stand if the underlying order on which it is based is invalid, because its only purpose is to secure compliance with the order. But a criminal contempt conviction does not turn on the validity of the order. Citing *Walker*, *Dickinson*, and others, the court held that the jurisdiction of the trial court was unquestioned, and because no effort was made to seek review before

disobeying the order, the appellants were properly convicted of contempt.[121]

Encouraging trial judges to hold those who disobey their orders in criminal rather than civil contempt, which would end with either compliance or a change in circumstances that makes compliance impossible, gives judges substantial power to enforce even unconstitutional orders. The blurring of criminal and civil contempt makes it difficult for both journalists and appellate courts to determine whether the contempt had ended or if it was a separate cause of action to be considered regardless of the status of the original order. If considered a separate action, then presumably journalists will be unable to collaterally challenge the original order, save for the limited exceptions under *Walker* , and could face substantial penalties even after the original had been invalidated. If strictly applied, the collateral bar rule assumes that the hearing to consider criminal punishment of those who disobey judicial directives is unrelated to the validity of the original order, and the disobeyance must be punished regardless of the ultimate determination of the validity of the order. Judges know that at least theoretically, anyone held in civil contempt could also be adjudged guilty of criminal contempt. In many jurisdictions, punishment for criminal contempt is likely to survive the invalidation of the original order and judges who heed the advice of appeals courts will know to make clear in their proceedings which form of contempt punishment is being imposed.

IV. Unconstitutional orders and reversal of contempt convictions: Inconsistency and confusion.

Several states both prior and subsequent to *Dickinson* have adopted rules relating to the validity of contempt citations based on unconstitutional orders. Yet those rules were unevenly applied in cases as the circumstances varied. And some courts that allowed exceptions to the collateral bar rule did not do so consistently.[122]

Washington

In *Superior Court of Snohomish County v. Sperry,* [123] the Washington Supreme Court clearly stated a year before *Dickinson* that an invalid order could not support a contempt citation. But a few years after *Dickinson*, the Washington court allowed a contempt citation to stand while invalidating the injunction on which it was based.[124]

In *Sperry*, two men were being tried in 1970 for first-degree murder. Because "comprehensive press coverage" was anticipated due to the facts surrounding the murders, the trial judge issued an order prohibiting news organizations from reporting on any proceedings that took place outside the presence of the jury.[125] Shortly after the trial began, the admissibility of certain evidence became an issue and a hearing was held in open court, but in the absence of the jury, to decide whether the evidence would be admitted. Some of the testimony was determined by the court to be inadmissible and the state was ordered not to present that part of the testimony to the jury.[126]

The next day the Seattle *Times* ran a story that included testimony related to probable cause for arresting the defendants and the legality of the search conducted in the hotel rooms where they were arrested, and other issues that were the subject of the hearing and judge's ruling outside the presence of the jury.[127] After reading the newspaper story, the trial judge summoned the reporters before him, barred them from further attendance at the trial, and ordered them to show cause why they should not be held in contempt for violating the court's order.[128] Subsequently, a show cause hearing was held and the reporters were adjudged guilty of contempt.

The Washington Supreme Court first considered the issue of whether challenging the constitutionality of the judge's order constituted a "collateral attack" on that order. The state, citing *Walker v. Birmingham,* argued that the order should have been attacked directly by appeal, by motion to set aside, or by other immediate review. The Washington Supreme Court, rejecting such an argument, distinguished *Walker* from *Sperry* in a number of respects:

> "There (*Walker*) the order was not patently invalid, as compared to the order challenged here which is void on its face....We have held in a number of cases that a void order or decree, as distinguished from one that is merely erroneous, may be attacked in a collateral proceeding....The violation of an order patently in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt."[129]

The state supreme court held that the collateral bar rule has "justifiably been subjected to much

legal criticism, particularly as it applies to free speech cases."[130] The court understood that injunctions are frequently issued immediately before the planned activity and there is no time for the enjoined party to make a direct attack on the injunction. And the court added:

"The practical result then is that the enjoined party has no adequate remedy at law and cannot engage in a lawful activity because of an unconstitutional order. To us it seems unlikely that allowing collateral attack would significantly reduce citizen compliance with lawful decrees... the citizen still faces a substantial risk of criminal penalties if proved wrong in collateral, rather than direct, attack on the decree's validity."[131]

The court held that the judge's admonition to the jury instructing them to consider only the evidence they hear in court and to not discuss the case with anyone, nor read or view any report about the trial, would likely be obeyed by the jury. If it did not and prejudicial matter reached and affected a member of the jury, the proper remedy would be a new trial.[132]

It then turned to the question of the contempt citation. In a very brief statement, the court held: "We conclude that the trial court's order was void and it cannot therefore support the contempt convictions of appellants who violated the order....To sustain this judgment of contempt would be to say that the mere possibility of prejudicial matter reaching a juror outside the courtroom is more important in the eyes of the law than is a constitutionally guaranteed freedom of expression. This we cannot say."[133]

Sperry's distinguishing of *Walker* was not extended by the state court to a case that involved a labor dispute. In *Mead*, the Washington Supreme Court sustained the contempt conviction of a teacher's union despite its holding that the trial court technically lacked jurisdiction to issue the order, and which it later held to be invalid.

The Mead School District filed a lawsuit seeking to enjoin a strike by its employees, members of the Mead Education Association. The teachers responded with a motion to dismiss on the grounds that the suit was authorized at a school board meeting held in violation of the Open Public Meetings Act.[134] The court later issued a temporary restraining order. The Supreme Court held that the trial court's denial of the teachers' petition was in error; that the school board had not properly authorized the lawsuit seeking the injunction.[135] The key question, then, was whether the fact that the injunction was later adjudged to be invalid "excuses the appellants' allegedly contemptuous conduct. Both parties rather facilely assume it does. We do not agree."[136]

The state supreme court identified several jurisdictional tests to determine the vitality of contempt convictions for violating an order later determined to be improper. First, "where the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt."[137] Second, the "test of the jurisdiction of a court is whether or not it had power to enter upon the inquiry, not whether its conclusion in the court of it was right or wrong."[138] And third, the court considered the concept of "jurisdiction to determine jurisdiction." The principle is that "a court's order must be obeyed if it had the power to decide whether it was authorized to issue it, even if it is later held that it was not so authorized."[139] The justification is the "fundamental premise that when a question of authority is raised, someone must decide it, and the initial decision is going to be made by the forum court itself."[140]

The Washington court recognized that literal application of the jurisdictional tests would require reversing the contempt convictions. The trial court's power to issue the injunction against the teachers' union was predicated on there being a case before it. "We have found there was not: the plaintiff failed to properly invoke the jurisdiction of the superior court."[141] And the court added:

"Technically, the court lacked jurisdiction over the parties, and virtually all the authorities in this area assume that such a defect will deprive a court of the authority to issue lawful orders and enforce them through contempt....Very few cases, however, have actually involved a flaw in 'jurisdiction' similar to the one here."[142]

The Washington court held instead that "talismanic invocation of the phrase 'lack of jurisdiction'...is not enough to vitiate a contempt conviction," adding:

"The only flaw in the trial court's jurisdiction...is the lack of proper authorization for the lawsuit brought before it by the Mead School

District. The district had the power to bring this sort of suit, and the trial court to hear it, but the district's lawyers had not legally been empowered to represent it in this case by any binding resolution of its board of directors. We cannot see how this should in any way diminish the respect due the order of the superior court. The defect was in the plaintiff, not the court."[143]

The court did reverse the convictions against individual officers on self-incrimination grounds, but upheld the contempt conviction against the association.[144] The court concluded that the purpose of the contempt conviction was independent of any concern for the parties, but was to "bolster respect" for future orders by "attaching a deterrent sanction to violation."[145]

More than a decade after *Sperry* and *Dickinson*, the Washington Supreme Court distinguished *Mead* and relied on *Sperry* in a case in which it decided that an unconstitutional order cannot support a contempt conviction. In *Washington v. Coe* [146] a trial court held a radio and television station in contempt for broadcasting accurate, lawfully obtained copies of tape recordings that had been played in open court.[147] The conversations were between the defendant and an undercover police officer. Coe was accused of attempting to hire the officer to murder the prosecutor and judge who had previously tried and convicted her son. After the stations obtained the tapes from the prosecutor, the trial judge ordered them not to broadcast them after defense attorneys presented evidence that their client's mental state would be harmed by public dissemination. Three days after the judge's order, the stations broadcast portions of the tapes on their newscasts, were held in contempt and fined $2,000.[148]

The stations appealed the contempt judgment on the ground that the order restraining broadcast of the tapes was constitutionally invalid and therefore a contempt conviction could not be based on its violation. Respondents argued that the order was constitutionally valid, and that "even if it were not, it would not relieve KHQ of the consequences of deliberately disobeying a court order."[149]

Citing *Sperry*, and referring to *Mead*, the court held that the injunction was not within the "scope of the jurisdiction of the issuing court," because it clearly violated free press provisions of the U.S. and state constitutions, and therefore cannot support a contempt citation:[150]

"The 'jurisdiction' test measures whether a court, in issuing an order or holding in contempt those who defy it, was performing the sort of function for which judicial power was vested in it. If, but only if, it was not, its process is not entitled to the respect due that of a lawful judicial body."[151]

And the court concluded, "under Washington law, if the order in this case was patently invalid or 'void' as outside the court's power, the contempt judgment against KHQ must be reversed."[152] Respondents had relied on *Walker*, *Dickinson* and other cases to argue that the *Sperry* rule was incorrect or inapplicable. To the Washington Supreme Court, "*Walker* and *Dickinson* represent the federal rule, which was distinguished and disapproved as a matter of state law by this court in *Sperry*."[153]

The court then discussed why state courts ought to be able to develop their own standards in this area of the law. It held that the issue of whether the prior restraint was "constitutionally valid or invalid should be treated first under our state constitution."[154] It described the relationship between the federal and state governments, and held that the "protection of the fundamental rights of Washington citizens was intended to be and remains a separate and important function of our state constitution and courts that is closely associated with our sovereignty."[155] And it added:

"The language of the Washington Constitution absolutely forbids prior restraints against the publication or broadcast of constitutionally protected speech under the facts in this case, since the information sought to be restraint was lawfully obtained, true, and a matter of public record by virtue of having been previously admitted into evidence and presented in open court."[156]

While the court was concerned about the defendant's right to a fair trial, it held that there are other adequate and constitutionally permissible methods for trial courts to protect those rights.[157] And the court reversed, without further explanation, the contempt citation against the broadcasting stations.[158] The court, largely ignoring *Mead* and acting as if *Sperry* had long ago settled the issue, never considered separately the question of whether the contempt citation ought to stand even though the order on which it was based was unconstitutional, as if In fact, the court seemed to

assume that journalists, judges and lawyers would have little trouble recognizing when an order was not "within the scope of jurisdiction of the issuing court."

The majority opinion in *State v. Coe* dealt almost entirely with the question of the constitutionality of the original order and did not consider it necessary to discuss the contempt conviction. Even the justices who wrote concurring opinions, which dissented in part, did not mention the issue of the validity of the contempt citation.[159]

California

The California Supreme Court held in *In re Berry*,[160] that an injunction issued against public employees who were threatening to strike to prevent them from picketing and from encouraging non-union employees to participate in a strike and related activities was unconstitutional on several grounds.[161] The petitioners disobeyed the judge's order by proceeding with the activities proscribed by the order and sought release from a contempt proceeding by filing a habeas corpus petition.

On appeal, the county, against whom the employees were taking the job action, argued that the constitutionality of the restraining order was irrelevant to the issue of contempt because the petitioners did not seek "vacation or modification of the order through available legal means prior to their willful violation of it." And it argued that such failure precludes the petitioners from challenging the constitutionality of the order in the context of contempt proceedings. The California Supreme Court, rejected this view: "In this state, it is clearly the law that the violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt."[162] And quoting from a 1941 state case, the court tried to define jurisdiction:

"Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis*, are in excess of jurisdiction."[163]

And the court further held that under state law, a person subject to an injunctive order can disobey such an order and challenge its validity when appealing a contempt citation:

"He may conclude that the exigencies of the situation or the magnitude of the rights involved render immediate action worth the cost of peril....Such a person may disobey the order and raise his jurisdictional contentions when he is sought to be punished for such disobedience. If he has correctly assessed his legal position, and it is...determined that the order was issued without or in excess of jurisdiction, his violation of such void order constitutes no punishable wrong."[164]

The California Supreme Court quickly brushed aside *Walker*, decided only a year earlier, as controlling in *Berry*. It asserted that the rule adopted in California is "considerably more consistent with the exercise of First Amendment freedoms than that adopted in Alabama, and it is therefore difficult to perceive how the *Walker* decision is of relevance herein."[165] And it concluded that the "transparent invalidity" exception in *Walker* provided justification to declare that California's rule that an order void upon its face cannot support a contempt judgment is consistent with *Walker*.[166]

Despite *Dickinson* and *Walker*, a federal court in California felt constrained to follow *Berry* as controlling. In *Glen v. Hongisto*,[167] the U.S. District Court for the Northern District of California, in a federal habeas corpus proceeding, reversed the contempt convictions of labor union leaders who violated a state injunction prohibiting their unions from striking.[168] The petitioners argued that the injunction was unconstitutionally vague and overbroad, that there was insufficient evidence to support a finding that they violated the injunction, and that the First Amendment protected their right to publish a newspaper advertisement discussing issues related to the labor dispute.[169]

Relying on the Supreme Court decision in *Thomas v. Collins*,[170] the district court held that petitioners could not be held in contempt simply because *one* of the acts for which they were convicted might validly have been punished.[171] In *Glen*, the trial court had stated that the contempt judgment was based partly on the publication of the advertisement which is protected by the First Amendment. It observed that if the federal rule were applied, the constitutionality of the injunction would not be an issue since the collateral bar rule would prevent review of the contempt convictions. But the issue in *Glen* was not whether the petitioners could use one of the two methods

provided in *Berry* for challenging an injunction, but whether the injunction applied to the activities undertaken by the petitioners, namely the placing of the advertisement. The district court determined that regardless of whether the injunction was facially invalid, it could not be applied to activity protected by the First Amendment: "The contempt judgment based on petitioners' supposed violation of the injunction must, therefore, be held impermissible."[172]

V. Rejection of the *Dickinson* rule at the federal level

The Fifth Circuit Court of Appeal's holding that judicial orders must be obeyed until modified or set aside on appeal has not only failed to persuade a number of state courts; the First Circuit Court of Appeals, after considering almost 15 years of post-*Dickinson* litigation, rejected the collateral bar rule in a case where a newspaper invited a confrontation with the courts by publishing one day before an unconstitutional restraining order was vacated.

In re Providence Journal,[173] involved Rhode Island's largest newspaper and its executive editor, Charles M. Hauser. Both were found guilty of criminal contempt after the newspaper published an article about the late Raymond L.S. Patriarca, a reputed major organized crime figure.[174] The newspaper obtained transcripts based on tape recordings made in the 1960's by an illegal FBI wiretap. After Patriarca's death, the FBI sent the information to the *Providence Journal* in response to a request under the Freedom of Information Act.[175] Patriarca's son learned that the paper planned an article based on the information and sought a restraining order, which federal judge Francis J. Boyle granted on November 13, 1985.[176] The judge then set a hearing for November 15, 1985, and which time he would decide whether to vacate the order. The district court later vacated the order and denied preliminary injunctive relief against the Journal and WJAR.[177]

On November 14, 1985, the day after the district court order was issued, and while it was still in effect, the *Journal* published the article. After appointing a special prosecutor,[178] and following a hearing, the district court found the Journal guilty of criminal contempt.[179] The judge later imposed harsh sentences: the editor was given an 18-month jail term, later suspended, to be followed by 200 hours of public service, and the newspaper was fined $100,000.[180]

Although the district court vacated the restraining order, the court of appeals decided to consider, first, whether the original order was unconstitutional before moving to the question of whether the contempt citation should stand. It realized that the case presented a conflict between two fundamental principles, "the hallowed First Amendment principle that the press shall not be subject to prior restraints; the other, the sine qua non of orderly government, that, until modified or vacated, a court order must be obeyed."[181] The special prosecutor, citing the "collateral bar" rule, argued that even unconstitutional orders must be obeyed.[182]

Citing *Nebraska Press* and other cases, the appeals court held that it was "patently clear" that the order of November 13th "fails to pass muster under the *Nebraska Press Association* test."[183] The court noted that a party seeking a prior restraint against the press must show not only that publication "will result in damage to a near-sacred right, but also that the prior restraint will be effective and that no less extreme measures are available. The district court failed to make a finding as to either of these issues, an omission making the invalidity of the order even more transparent."[184]

In words that demonstrated much compassion for the role of a daily newspaper, the court stated:

> "It is misleading in the context of daily newspaper publishing to argue that a temporary restraining order merely preserves the status quo. The status quo of daily newspapers is to publish news promptly that editors decide to publish. A restraining order disturbs the status quo and impinges on the exercise of editorial discretion. News is a constantly changing and dynamic quantity. Today's news will often be tomorrow's history."[185]

The court then turned to the question of contempt. It acknowledged that *Walker v. Birmingham* would, "at first glance, appear to control the instant case." The difference, according to the court of appeals, was that in *Walker* the Supreme Court was "careful to point out that the order issued by the Alabama court was not 'transparently invalid.'"[186] And the court of appeals in *Providence* held that to mean that a

transparently invalid order cannot form the basis for a contempt citation.[187]

Having stated the principle that transparently invalid orders cannot support contempt citations, the court of appeals did not provide much guidance that would help journalists and others to recognize such an order when it is made. The court admitted that the "line between a transparently invalid order and one that is merely invalid is, of course, not always distinct."[188] And it held that there should be a heavy presumption in favor of validity.[189]

While the court never directly defined such an order, it suggested that the failure to follow certain procedures would make invalidity even more transparent. For example, as noted above, the failure on the part of the district court tc make a finding as to the applicability of the requirements of the *Nebraska Press Assoc.* test made the invalidity of the order more obvious. In addition, the fact that a prior restraint order issued before a "full and fair hearing" with all the attendant procedural protections "faces an even heavier presumption of invalidity" and the "transparent unconstitutionality of the order is made even more patent by the absence of such a hearing."[190]

The court concluded that because the order was transparently invalid, the appellants should have been allowed to challenge its constitutionality at the contempt proceedings. And it stated, "the order cannot serve as the basis for the contempt citation."[191]

The First Circuit recognized in *Providence* that a requirement of civilized government is that a party subject to a court order must abide by its terms or face criminal contempt. But an order entered by a court clearly without jurisdiction over the contemnors or subject matter is not protected by the collateral bar rule:

"Requiring a party subject to such an order to obey or face contempt would give the courts powers far in excess of any authorized by the Constitution or Congress....Although a court order -- even an arguably incorrect court order -- demands respect, so does the right of the citizen to be free of clearly improper exercises of judicial authority....When the order is transparently invalid...the court is acting so far in excess of its authority that it has no right to expect compliance and no interest is protected by requiring compliance."[192]

In an unusual development, the First Circuit Court of Appeals granted a petition for rehearing en banc and issued a per curiam opinion on May 12, 1987, "modifying" the decision by the three-judge panel.[193] The en banc court recognized, as did the panel, the difficulty of requiring a publisher to pursue the normal appeal process.[194] But it felt compelled to offer what it characterized as "technically dictum" in an effort to balance the conflicting principles of the collateral bar rule and no prior restraints against pure speech.

The en banc opinion suggested that publishers make an effort to appeal what they consider to be an unconstitutional order rather than simply disobey it:

"It is not asking much, beyond some additional expense and time, to require a publisher, even when it thinks it is the subject of a transparently unconstitutional order of prior restraint, to make a good faith effort to seek emergency relief from the appellate court. If timely access to the appellate court is not available or if timely decision is not forthcoming, the publisher may then proceed to publish and challenge the constitutionality of the order in the contempt proceedings....Such a price does not seem disproportionate to the respect owing court processes; and there is no prolongation of any prior restraint. On the other hand, should the appellate court grant the requested relief, the conflict between principles has been resolved and the expense and time involved have vastly been offset by aborting any contempt proceedings."[195]

The court understood that the publisher would have to demonstrate some record of its good faith effort, but added, "that is a price we should pay for the preference of the court over party determination of invalidity."[196]

The en banc opinion was issued as an "addendum to, and modification of" the opinion of the three-judge panel and the panel's opinion "may stand as reflecting the opinion of the en banc court."[197] And it added: "We recognize that our announcement is technically dictum, but are confident that its stature as a deliberate position taken by us in this en banc consideration will serve its purpose."[198]

The en banc opinion expressed substantial understanding of the role of journalists. Its holding that they may collaterally challenge judicial orders when emergency relief is unavailable leads to a compromise that is supported by other cases, and

discussed below. Such a compromise requires that journalists appeal court orders first, and disobey such orders only in cases where appellate relief was not forthcoming before the time of publication. While such a compromise will not cover all circumstances, it may free journalists from punishment for disobeying unconstitutional orders while maintaining respect for judicial decisions.

VI. The "collateral bar" rule after *Providence:* state-by-state adjudication or national standards?

U.S. v. Providence Journal would have provided the first opportunity for the Supreme Court to directly consider the applicability of the collateral bar in a case where an unconstitutional prior restraint order had been issued against a news organization. The Court could have established national standards in an area of the law marked by inconsistent, contradictory, and often confusing decisions that vary substantially by jurisdiction.

As has been discussed, courts in Washington and California, and the First Circuit Court of Appeals, have held that unconstitutional prior restraints on certain types of speech may be collaterally challenged while appealing a contempt conviction. State courts in Alabama and the Fifth Circuit Court of Appeals have upheld the collateral bar in cases involving First Amendment rights.

Even within states that allow an exception to the rule and hold that an invalid order cannot support a contempt conviction, there is inconsistency. Washington, for example, strongly suggested in *Sperry* that when the order is "patently invalid," *Walker* is not controlling. It also suggested in *Sperry* that an order "patently in excess" of the jurisdiction of the issuing court cannot produce a valid judgment of contempt. But in *Mead*, the state supreme invalidated the injunction but upheld the contempt conviction. Then in *Washington v. Coe*, the state supreme court largely ignored *Mead* and relied on *Sperry* in holding that the court's order was invalid, and it reversed the contempt citation.

In *Providence*, the Supreme Court could have determined the extent to which it wants to provide national standards and displace existing state law. While case law relating to the collateral bar rule and the First Amendment is at a primitive stage in many jurisdictions, some states have developed their own jurisdictional tests to determine whether a court had the authority to issue a particular order, and it may be difficult for the Supreme Court to replace those with its own.

It will be recalled, for example, that the Washington Supreme Court in *Coe* stated that the issue of whether the prior restraint order was constitutionally valid or invalid should be treated first under the state constitution. It said that protection of fundamental rights is an important function of the state constitution and courts. It then relied on language of the state constitution which provides broad protection to the exercise of First Amendment rights. If a state court is determined to adopt a more press-protective standard than would be available by the United States Supreme Court, it may simply base its decision on its own constitution and circumvent the Supreme Court's opinion.[199] In this era of "legal decentralization" states have been granted substantial autonomy to interpret what had previously been considered federal rights. Especially in an area of the law that directly affects the legitimacy of the courts, like the collateral bar rule, it would be expected that states would not surrender to the Supreme Court total control to determine when judicial orders can be collaterally challenged.

Yet there is substantial danger to the First Amendment when it is subjected to interpretation that varies by jurisdiction. National news organizations cannot function properly if the First Amendment means one thing in one state, and something very different in another. The challenge for the Supreme Court may be to establish general standards that leave room for state innovation. For example, the Supreme Court may require an exception to the collateral bar rule when no adversarial hearing has been held prior to the issuance of a restraining order against the press. It may require such an adversarial hearing but leave to the states the procedures under which such a hearing is conducted.

The Supreme Court could establish minimum standards and allow states the flexibility to provide greater First Amendment protection than is required by those standards. Libel provides an example. The Supreme Court in *Gertz v. Welch* [200] in 1974 established a minimum standard of fault which the states must observe, but allowed state courts to determine the standard of liability for private person libel plaintiffs (negligence, actual malice, or some combination.) Although granting states autonomy over key elements in libel law has led to substantial variance among jurisdictions in the

amount of First Amendment protection provided to news organizations, it nevertheless demonstrates the Supreme Court's commitment to allowing a greater role for state courts.[201]

Courts considering collateral bar cases have varied widely in the procedures they follow prior to issuing the order. Some issue ex parte orders without any effort to hear the constitutional claims of news organizations. Other have held hearings where both parties were able to present their case. The Supreme Court may need to consider whether a hearing held prior to issuance of the prior restraint order in which the news organization participates requires a stricter application of the collateral bar rule. Applying the collateral bar rule uniformly to both cases where such a hearing was held and those where the order was issued ex parte without such a hearing is inappropriate. In *Providence*, the Court could have outlined the type of proceedings that would be required before a news organization forfeits its right to collaterally challenge the order when appealing a contempt conviction.

The Supreme Court should have left undisturbed the decision of the en banc and three-judge panel of the First Circuit reversing the contempt conviction, but on substantive and not purely procedural grounds. While the newspaper unnecessarily aggravated tensions between journalists and judges by publicly proclaiming its disobedience, it nevertheless was subjected to a clearly unconstitutional prior restraint order. The harshness of the contempt sentences only serves to reinforce the vigilance that must be exercised by appellate courts in reviewing orders that affect vital free speech and press rights.

The Supreme Court may need to reinforce its previous opinions that suggest a strong presumption of unconstitutionality of an any order that touches pure speech, such as testimony heard in open court. Except in highly unusual circumstances, it is difficult to conceive how a court could punish news organizations for accurately publishing information that would be available to any citizen who attended a trial. Such a reaffirmation would notify trial judges that the Supreme Court is committed to *Oklahoma* and *Cox*. The Supreme Court may also need to reaffirm *Nebraska Press Association* so trial judges will issue gag orders against the press only when its very strict three-part test has been satisfied.

The Court must also address the issue of violation of an injunction versus that of a statute. As discussed before, *Walker* and *Shuttlesworth* originated from the same events but led to opposite results. The Court must determine the extent to which disobeyance of an invalid court order is constitutionally equivalent to the violation of a statute. If it holds that they are largely similar, it will have no choice but to severely limit the application of the collateral bar rule in First Amendment cases. If it determines that there exists a fundamental difference, it will have to explain why the same conduct is punished if it violates an unconstitutional order, but vindicated if it is violates an illegal statute.

Providence could also have provided a forum for discussion of the nature of the contempt power. As a final vestige of common-law crime, contempt seems out of place in a society that places so much value on procedural due process. The arbitrary nature of contempt and the severity of the penalties associated with it require some attention by the Court. To allow a judge who is the subject of the affront to the court's authority to sit as grand jury, prosecutor, witness, trial jury and sentencing judge is at odds with notions of fundamental fairness. The Supreme Court's willingness to allow a judge in such a situation to sentence for criminal contempt up to six months before the alleged contemnor is entitled to a trial with all procedural rights seems at best anachronistic, at worst, barbaric.[202] A lawyer for a television network should not be immediately jailed after refusing to provide a documentary that was to be shown the next night so the judge could check for inaccuracies.[203] While appeals courts stand ready to intervene, the potential for a trial judge to inflict serious penalty for disobedience of a clearly unconstitutional order is always present.

Providence would also have allowed the Supreme Court to directly address the issue of jurisdiction. While it is difficult to define, the Court must provide guidance to state and federal courts that will help in determining when they have subject-matter jurisdiction or jurisdiction over the parties in a case involving First Amendment interests. Judges, for example, who issue prior restraint orders against the press often include sweeping statements to the effect that *all* news organizations must abide by the decree. Yet some appellate courts have questioned whether news organizations that did not have representatives (such as reporters) in the courtroom at the time the order was issued, or those outside the geographical jurisdiction of the court, are bound by it. Appeals courts have often vacated orders that were issued

against news organizations that may not even be aware of the order, much less have an opportunity for contesting the order before it is issued.

The Supreme Court could also have considered the difficult question of verbal orders. When non-written orders are directed at the press, the judge becomes a witness in his own case. Only after the appeal is taken does the judge attempt to reconstruct the verbal order so the appellate court has a written record to examine. It seems unfair to expect journalists who are present in a courtroom to cover a news event to understand the full implications of a hastily delivered verbal order given by an impatient judge just prior to the beginning of a trial.

Those concerned about the vitality of the First Amendment are probably relieved that the Supreme Court did not reverse the First Circuit's decision in *Providence*. The appellate court's strong statement limiting the collateral bar rule in cases involving certain types of speech demonstrated much sympathy for the role of journalists. Many of the justices of a now increasingly-conservative Supreme Court have been much less tolerant of the First Amendment claims of journalists. The Supreme Court may well reverse in a case similar to *Providence* in the future. reversed a case if presented with similar issues. If the Supreme Court had required strict application of the collateral bar rule in *Providence*, the best journalists could have hoped for is that the Court will allow exceptions when the injunction is patently invalid or clearly outside the authority of the court.

VII. A possible compromise: appeal first, disobey second.

Balancing the compelling interests of the courts to have their orders obeyed with First Amendment freedoms presents no easy answers. A possible compromise, for which there is some precedent, would be for news organizations to initially obey an order they consider unconstitutional, while seeking an expedited appeal.[204] If such an appeal is not heard or completed by the time of publication, journalists may be on more solid ground in pressing a collateral attack than if they had simply disobeyed the order without seeking an appeal.[205]

In *New York Times v. Starkey*, [206] the appellate division of the state supreme court vacated an oral order directing newspapers not to publish information except that which was made available in open court.[207] An initial appeal of the trial judge's order was rejected by a member of the appellate court, and the Times continued to publish articles containing information about the defendants' criminal background, in disobeyance of the judge's order.[208] While the appellate court did not directly discuss the fact that the petition seeking to vacate the trial judge's order was followed by the publication of articles in direct violation of the order, and prior to the decision of the appellate court, the fact that events happened in that order is significant. There was never any suggestion that the newspaper had forfeited its right of collateral attack by disobeying the judge's order.[209]

The procedure of appealing an order suspected of being constitutionally infirm before disobeying it may serve both the interests of both the press and courts. Such a compromise would be contingent on the ability of the press to publish and then collaterally attack the original order on appeal for conviction of contempt if the appeal could not be completed before press time.

Such a procedure would place substantial burdens on already crowded appellate court dockets.[210] It may also force appellate courts to make hasty decisions on important issues that would have been considered more fully had time permitted.[211] But considering the fundamental nature of free press rights, such expedited appeal may be both constitutionally required and administratively necessary. The alternative is the continued diminution of the legitimacy of the courts by having news organizations disobey orders they believe will be reversed on appeal. News organizations could also make a positive contribution to the problem by not flaunting their disobedience in print.

Undoubtedly, problems will arise when the order comes just before the time of publication. Because the timeliness of news is such an important element, news organizations covering a criminal trial, for example, will likely publish a story every day the trial is in session, and thus even the most expedited appeal will not come before the violation of the judge's order. But if judges make orders that unconstitutionally restrict the exercise of First Amendment rights, they may have to suffer the damage to their credibility that occurs when their orders are disobeyed and then challenged collaterally on appeal from a contempt conviction.

In *Cooper v. Rockford Newspapers*,[212] the Illinois second district appellate court allowed the newspaper to make a collateral attack on an invalid order while appealing the contempt conviction in part because the order was not issued ex parte and the newspaper's attorneys, in the words of the appellate court, had "respectfully argued to the trial court the constitutional issues which we found compelling on appeal before the alleged disobedience."[213] The implication is that journalists who are provided the opportunity to argue the constitutional issues before the restraining order is issued are entitled to collaterally challenge the order on the grounds that the they did not willfully disobey the order without first attempting to prevent its issuance or implementation. If journalists, then, are entitled to the privilege of disobeying orders if they had the opportunity to argue against them prior to their issuance, it would certainly follow that they would be able to collaterally challenge orders that are issued ex parte in a hearing in which their claims were not considered.

Anyone subject to a restraining order should make every effort to have it modified or vacated by the issuing or an appellate court before disobeying it. The effectiveness of the courts depends on their ability to have orders obeyed. But if an invalid order prevents the exercise of First Amendment rights, and the appeal cannot be heard before the circumstances require public dissemination, journalists must be able to challenge the order when appealing a contempt conviction. Such a collateral challenge shows no more disrespect for the law than an invalid court order restricting freedom of speech and press.

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[1]A contempt of court is a willful disregard for its authority. The purpose of a criminal contempt proceeding is to "vindicate the authority of the court and to deter similar derelictions." Wright, Federal Practice and Procedure: Criminal 2d Section 702 p. 809. Wilfulness is an essential element of criminal contempt. See, e.g. *U.S. v. United Mine Workers* , 330 U.S. 258, 303 (1947). While civil contempt is distinct from criminal contempt, they are sometimes so closely intertwined it is difficult to tell where one ends and the other begins. Civil contempt is primarily brought to preserve and enforce rights of private parties to a suit and to compel obedience to orders and decrees made for the benefit of such parties. A person may be punished for criminal contempt for defying the authority of a court in a civil action. For a discussion of criminal and civil contempt, see, e.g., *In re Timmons*, 607 F. 2d 120 (5th Cir. 1979) at 123-124. In some cases, it is difficult for the appellate court to determine from the record whether the contempt conviction was criminal or civil. See, *Fitchburg v. 707 Main Corp.*, 343 N.E. 2d 149 (Mass. Sup. Jud. Ct., 1976), discussed infra. One observer wrote: "The distinction between civil and criminal contempt is not clear cut. The same act in different situations may be regarded as either civil or criminal. Contempt has been regarded as criminal if the purpose is to punish the contemnor for misconduct in the presence of the court or for conduct out of the court's presence challenging its authority, and the contemnor is fined a fixed amount or imprisoned for a definite term; it is regarded as civil if the primary purpose is to coerce compliance with a court order, usually for the benefit of an injured suitor, and the contemnor is imprisoned only until he complies. Whether the contempt is civil or criminal depends on the judicial decision maker." L. Kutner, "Contempt Power: -- The Black Robe; A Proposal for Due Process," 39 *Tenn. L. Rev.* 1 (Fall, 1971) at 8.

[2]A judge will often suspend a jail sentence until the alleged contemnor has exhausted all appeals, but see *Goldblum v. National Broadcasting Company*, 584 F. 2d 904 (1978) where an NBC attorney was immediately jailed when he refused to turn over a documentary that was to be aired the following evening so the judge could check for "inaccuracies." Id. at 906. The U.S. Court of Appeals for the Ninth Circuit, issuing a writ of mandamus, reversed the trial court's order as an unconstitutional prior restraint and ended the contempt citation. Id. at 907. See also, *Ex parte Purvis*, 382 So. 2d 512 (Ala. Sup. Ct., 1980).

[3]For development of contempt in state and federal courts, see generally, *Ex parte Robinson*, 86 U.S. (19 Wall.) 505 (1874); *Toledo Newspaper Co. v. U.S.*, 247 U.S. 402 (1918); *Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947); *Shillitani v. United States*, 384 U.S. 364 (1966); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *Bloom v. Illinois*, 391 U.S. 194 (1968).

[4]For development of the "preferred position" theory, see *Palko v. Connecticut*, 302 U.S. 319, 326-327 (1937); *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 (1938); *Jones v. Opelika*, 316 U.S. 584, 608, (1942); *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943); *Thomas*

v. Collins, 323 U.S. 516, 530 (1945). See also, R. Labunski, *Libel and the First Amendment: Legal History and Practice in Print and Broadcasting* (1987).

[5]*Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

[6]*Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976). But see contra, *U.S. v. Progressive*, 467 F. Supp. 990 (1979).

[7]In *Cooper v. Rockford Newspapers*, 365 N.E. 744 (1977), the trial judge imposed the contempt citation *after* the Illinois second district court of appeal had already determined that the underlying injunction was unconstitutional. At 747. (to be discussed infra). Never in its history has the U.S. Supreme Court upheld a prior restraint on "pure speech." See, for example, *In re Providence Journal Company*, 820 F. 2d 1342 at 1348 (1st Cir. 1986). The Supreme Court wrote, "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Assoc.*, 427 U.S. at 559. When speech is combined with "conduct," as in a labor dispute, restraints on picketing and other First Amendment activities have been upheld by the Supreme Court. As will be discussed infra, courts have been more likely to uphold contempt convictions based on violations of orders involving conduct than those involving pure speech.

[8]There may also be a fourth choice for journalists: appeal the original order, but if disposition of the case does not come before press time, publish, then collaterally attack the original order when the case is considered on appeal. As will be discussed infra, some courts have suggested a willingness to consider collateral attacks when the appeal did not come in time, as opposed to disobeyance of the order without an effort to have it modified or overturned. The issue of how quickly appellate courts can hear cases involving gag-orders and other forms of prior restraint is important. Appellate courts are often unable to consider such an appeal before the time of publication, which may be a few days or less, thus forcing a journalist to choose from among the options listed above.

[9]See Note, "Defiance of Unlawful Authority," 83 Harv. L. Rev. 626, 634 (1970); See also, *Superior Court of Snohomish County v. Sperry*, 483 P. 2d 608, 611 (Wash. Sup. Ct., 1971); and *In re Berry*, 436 P. 2d 273, 280-282 (Cal. Sup. Ct., 1968) to be discussed infra.

[10]*Walker v. Birmingham*, 388 U.S. 307 (1967); and *U.S. v. Dickinson*, 465 F. 2d 496 (5th Cir. 1972). But in *United States v. United Mine Workers*, the Supreme Court appeared to extend the right to collaterally attack an injunction in cases not just where the issuing court lacked jurisdiction, but where the jurisdiction was "frivolous and not substantial." 330 U.S. 258 (1947) at 293. The Supreme Court in *Walker* extended the exceptions even further by allowing collateral attack on the merits of the injunction and not just on the basis of jurisdiction.
In *U.S. v. Providence Journal*, 48 CCH S. Ct. Bull. 1874 (May 2, 1988), the Supreme Court declined to settle the issues raised by inconsistent application of the collateral bar rule, including resolving the directly opposite conclusions reached by the First Circuit Court of Appeals in *Providence*, and the Fifth Circuit in *Dickinson*. As is discussed infra, the Court decided *Providence* on purely procedural grounds.

[11]809 F. 2d 63, 66.

[12]809 F. 2d at 73-74, n. 71.

[13]While most states have heard cases involving prior restraint and disobedience of invalid orders, few have focused directly on the question of the validity of the contempt conviction after the original order was invalidated.

[14]809 F. 2d at 65. Courts that have vacated a contempt citation based on an unconstitutional order include Washington, *State Ex. Rel. Superior Ct. of Snohomish Co. v. Sperry* 483 P. 2d 608, 79 Wash. 2d 69 (1971); Illinois, *Cooper v. Rockford Newspapers*; Arizona, *Phoenix Newspapers v. Superior Court*, 418 P. 2d 594 (1968); California, *In re Berry*, 436 P. 2d 273 (1968); Massachusetts, *Fitchburg v. 707 Main Corp.*, 343 N.E. 2d 149 (1976); and the First Circuit Court of Appeals, *In re Providence Journal*, 820 F. 2d 1342 (1986). Some courts identified here have upheld contempt convictions even when the original order was invalidated. These cases will be discussed infra.

[15]*Walker v. Birmingham; U.S. v. Dickinson;* See e.g., *Ex Parte Purvis*, 382 So. 2d 512 (Ala. Sup. Court, 1980); *Mead School District v. Mead Educations Ass'n.*, 530 P. 2d 302 (Wash. Sup. Court, 1975). In *Mead*, the contempt conviction was upheld even after the state supreme court determined that the trial court technically lacked jurisdiction to issue the restraining order. For very limited exceptions to the rule, see *Eastern Associated Coal Corp. v. Doe*, 220 S.E. 2d 672 (Sup. Ct. of App. W.V., 1975), note 195 infra.

[16]*Walker v. Birmingham*, 388 U.S. 307, at 320-321.

[17]For an eloquent statement of this principle, see *U.S. v. Dickinson*, 465 F. 2d at 510.

[18]See Redish, "The Proper Role of the Prior Restraint Doctrine in First Amendment Theory," 70 *Va. L. Rev.* 53, 94-95. (1984).

[19]388 U.S. 307 (1967).

[20]394 U.S. 147 (1969).

[21]*Walker* is discussed in detail infra.

[22]394 U.S. at 151.

[23]Jurisdiction is both complex and a key element in determining whether a collateral attack on an unconstitutional order will be allowed. For example, "subject matter" jurisdiction differs from jurisdiction over the parties. In some cases, courts have simply stated that if the order was void on its face, or transparently invalid, the court lacked jurisdiction to have issued it. See *Sperry* and *Berry* infra. But see contra, *Mead School District v. Mead Education Ass'n.*, discussed infra.

[24]In arguing against the collateral bar rule, Redish states: "The same principle applies to statutes invoked against expression activity: no one suggests that a justification sufficiently compelling to uphold such a statute would further justify a refusal to allow an intentional violator to challenge the statute's constitutionality as a defense to a prosecution. Because no strong justification exists for the collateral bar rule in any context -- at least as long as criminal prosecutions for violations of statutes are not deemed to require a similar rule -- it follows that the collateral bar rule can never been justified in the enforcement of a preliminary injunction." Redish, p. 98-99. But Redish would allow application of the rule if there has been a "full and fair hearing by a competent judicial forum" prior to the injunction. In such a situation, there is no constitutionally based reason why someone should be able to raise the First Amendment issue a second time: "To allow this issue to be raised would be to permit two bites at the judicial apple, a practice not required by either the first amendment or due process." Id. at 97.

[25]427 U.S. 539 (1976).

[26]In *Nebraska*, a trial judge had issued a restraining order against the press preventing them from reporting a confession, which the Supreme Court held to be an unconstitutional prior restraint. See Goodale, "The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart," 29 *Stanford L. Rev.* 497 (1977). The test requires that 1) there be a finding of persuasive publicity that affects jurors; 2) a finding that there are no alternative methods available to the court other than issuance of prior restraints on the press; and 3) a finding that the prior restraint will be effective. Goodale notes that considering the substantial publicity surrounding the murders in this case, if these circumstances did not justify a prior restraint order, it would be difficult to imagine what case would: "*Nebraska Press Association* involved a sexually-motivated mass murder in a small town with an admission of guilt made by the defendant to relatives and a confession to public officials. Certainly, 'a confession or a statement against interest is the paradigm' of prejudicial information that could reach jurors. Nonetheless, the majority opinion concluded that the trial judge could only speculate as to the prejudicial effects on potential jurors of publicity concerning these inflammatory events and therefore that a prior restraint was not justified." Id. at 503. Goodale does make the point that prior to the case, press lawyers "had thought that national security cases were the sole exception to the constitutional prohibition against prior restraints on the press." Id. at 497. Yet despite the Supreme Court's unwillingness to prohibit all such orders, the three-step test developed in the *Nebraska Press Association* case makes it highly unlikely such an order would be upheld on appeal.

[27]For example, in *United States v. Schiavo*, 504 F. 2d 1 (3rd Cir. 1974), a trial judge had issued a verbal order that reporters could not publish information about a pending indictment of a defendant on other crimes while a perjury trial was in progress. The Philadelphia Inquirer disobeyed the district court order by publishing the information. Id. at 3. The court of appeals struck down the order as procedurally deficient and did not reach the constitutional issues. The timing of the order shows how difficult it can be to obtain appellate relief prior to the time of publication: the trial judge's ordered was issued at 2:00 PM; the court denied a motion to vacate two hours later; the jury returned a verdict in the perjury trial the same afternoon. The court of appeals did not grant a stay of the judge's order until the following Wednesday, five days later. In the appellate court's words, "by the time the strictures of the district court's order were lifted, the information covered by the order had, for all practical purposes, lost its timeliness." Id. at 10. See also, *American Broadcasting Co. v. Smith Cabinet Manufacturing Co.*, 312 N.E. 2d 85, decided by the First District Court of Appeals of Indiana in 1974. ABC appealed a judge's restraining order telling the network that certain parts of a documentary it planned to show a few days later must be changed. ABC violated the

judge's order by not making the changes, and appealed after it was aired. Id. at 87. The court rejected Smith Cabinet's argument that broadcasters are entitled to less First Amendment protection than print journalists in this case; see R. Labunski, *The First Amendment Under Siege: The Politics of Broadcast Regulation* (1981); the court also rejected the company's contention that it had been libeled by the broadcast; see, R. Labunski, *Libel and the First Amendment: Legal History and Practice in Print and Broadcasting* (1987); and R. Labunski, "Pennsylvania and Supreme Court Libel Decisions: The 'Libel Capital of the Nation' Tries to Comply," 25 *Duquesne L. Rev.* 87 (Fall, 1986).

[28]Justice Brennan noted in *Nebraska* that the gag orders eventually struck down "were in effect for over 11 weeks." 427 U.S. at 609 n. 38. Goodale, referring to *Dickinson*, notes the irony of this situation: "Having fought off governmental censorship successfully for centuries, the American press suddenly found itself faced with censorship maintained by the judiciary, the one branch of government that historically had protected the press from the others." Id. at 505.

[29]Goodale, at 505-506. He maintains that the tradition of disobeying and collaterally attacking such orders should continue in state courts despite *Dickinson* and *Walker*. And if such an order should be issued in federal court, Goodale maintains that it may also be attacked collaterally. Id. at 506-507.

[30]Id. at 509-510, 511.

[31]See Barnett, "The Puzzle of Prior Restraint," 29 *Stanford L. Rev.* 539, 554-555 (1977).

[32]429 U.S. 967 (1976), order stayed; 430 U.S. 308 (1977), per curiam opinion. In *Oklahoma*, the Supreme Court stayed, and thus effectively struck down, a gag order of an Oklahoma court enjoining the news media from publishing the name or picture of a minor involved in a pending delinquency proceeding. The Court noted that "the name and picture of the minor...were made available to the public as a result of a hearing held at the outset of this case which was in fact open to the press." 429 U.S. at 968. The Oklahoma judge granted the stay despite the clear language of *Nebraska* and it was in effect for 3 months until invalidated by the Supreme Court. Barnett, at 556.

[33]420 U.S. 469 (1975). In *Cox*, the Court overturned a privacy award by a Georgia jury after a television station broadcast the name of a young woman who had been raped and murdered, which was prohibited by Georgia law. The Supreme Court held that since the information was truthfully reported and obtained from public records the station had a privilege to report the information.

[34]Barnett makes the additional point that since such reporting is protected from prior restraint, it is protected from subsequent punishment as well. Id. a 557. See e.g., *Wood v. Goodson*, 485 S.W. 2d 213 (1972). In *Wood*, the Arkansas Supreme Court overturned a trial judge's order prohibiting a newspaper from reporting a jury's verdict while a related case was still pending. The trial judge said even though the verdict was returned in open court, "I do not consider it a public record." Id. at 215. After the local newspaper published the verdict, the editor was adjudged guilty of contempt and sentenced to a fine of $250 and 60 days in jail. Id. at 214. In reversing the contempt conviction, the state supreme court held that "no court...has the power to prohibit the news media from publishing that which transpires in open court. Consequently, it follows that the order not to publish was void and also subject to collateral attack." Id. at 217.

[35]See generally, Meiklejohn, "The First Amendment Is an Absolute," *The Supreme Court Review* (1961); and Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," 79 *Harvard. L. Rev.* 1 (November, 1965); Chafee, *Free Speech in the United States* (1941); See also *In re Farber*, 394 A. 2d 330 (1978). Farber, a New York Times reporter, was jailed for contempt after he was called as a defense witness in a murder trial and declined to provide testimony that would reveal the name of confidential sources. Despite having one of the most protective shield laws in the nation, the New Jersey courts held that the Sixth Amendment right of the defendant outweighed statutory and constitutional protection for Farber and the newspaper.

[36]The procedural issues in *Providence* are discussed here. The substantive issues decided by the First Circuit Court of Appeals in the case are discussed in a later section.

[37]56 U.S.L.W. 3242 (October 5, 1987) (87-65). Oral argument was heard January 20, 1988. The First Circuit Court of Appeals' decision in *Providence* is discussed in detail infra.

[38]48 CCH S. Ct. Bull. 1874. Blackmun, J., delivered the opinion of the Court, in which Brennan, White, Marshall, O'Connor, and Scalia, JJ., joined. Stevens, J. and Rehnquist, CJ., dissented. Kennedy, J., took not part in the case.

[39]Id. at 1880.

[40]Courts may impose summary contempt penalties in certain cases, but other contempts are prosecuted at trial with the alleged contemnor granted all

procedural rights. The Court stated: "The ability to punish disobedience to judicial orders is regarded as essential in ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other branches." Id. at 1883.

[41]Id. at 1880.

[42]Id.

[43]Id. The Supreme Court relied on Title 28 U.S.C. Section 518 (a) which states that "Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court...in which the United States is interested." The Court further held that *Providence* was clearly a case "in which the United States is interested." Id. at 1881. See also, *Young v. United States ex. rel. Vuitton et Fils*, ____U.S.____(1987).

[44]The Supreme Court rejected the special prosecutor and Solicitor General's argument that *Providence* is not a case in which the United States in interested because that phrase, as used in Section 518 (a), refers solely to those cases where the interests if the Executive Branch of the United States are at issue. The Court found "somewhat startling" the argument that the special prosecutor "acted in support of the power of the Judicial Branch, rather than in furtherance of the Executive's constitutional responsibility." Such an interpretation of Section 518 (a), the Court added, "presumes that there is more than one 'United States' that may appear before this Court, and that the United States is something other than "the sovereign composed of the three branches." The Court rejected such an interpretation of the statute. Id. at 1882.

[45]The Court said: "For just as the District Court would be 'at the mercy of another branch in deciding whether such proceedings should be initiated,' if it lacked the power to appoint a private attorney to prosecute the contempt charge, the judgment vindicating the District Court's authority would be vulnerable to the Attorney General's withholding of authorization to defend it." Id. at 1883.

[46]Id. at 1883-1884.

[47]The Court explained: "Where the majority of a panel of a court of appeals...itself has decided in favor of the alleged contemnor, the necessity that required the appointment of an independent prosecutor has faded and, indeed, is no longer present." Id. at 1884.

[48]Id. at 1885.

[49]Id. at 1880, n. 5. Justice Scalia, in a brief concurring opinion, asserted that district courts "possess no power, inherent or otherwise, to prosecute contemnors for disobedience of court judgments and no derivative power to appoint and attorney to conduct contempt prosecutions." Id. at 1890.

[50]Issues for the Court to consider are discussed infra.

[51]For a detailed history of contempt, see Goldfarb, *The Contempt Power* (New York: Columbia University Press, 1963). Statutory limits on contempt in federal courts emanate primarily from The Contempt Statute of 1831, 4 Stat. 487, which was enacted by Congress in direct response to a federal district judge's imprisoning of a writer who criticized one of the judge's opinions. Congress intended in the 1831 statute to eliminate constructive contempt. See also Section 401 of the Federal Criminal Code, 18 U.S.C. Section 401 and Rule 42 of the Federal Rules of Criminal Procedure.

[52]388 U.S. 307, affirming 279 Ala. 53, 181 So. 2d 493.

[53]Id. at 312. The judge imposed sentences of five days in jail and a $50 fine. The Supreme Court later held that the ordinance under which the order was issued violated the First Amendment. *Shuttlesworth v. City of Birmingham.*

[54]Id. at 311, 312-313.

[55]*Cox v. New Hampshire*, 312 U.S. 569 (1941); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Adderley v. Florida*, 385 U.S. 39 (1966).

[56]388 U.S. at 315. In *Providence*, the Court of Appeals wrote that the "unmistakable import of this (Walker) language is that a transparently invalid order cannot form the basis for a contempt citation." 820 F. 2d at 1347. See e.g. Wright, Federal Practice and Procedure, Section 702 at 815 n. 17.

[57]See *Washington v. Coe*, 679 P. 2d 353, 357 (1984), discussed infra.

[58]388 U.S. at 317.

[59]See especially, *In re Berry*, discussed infra, where the California Supreme Court criticized and distinguished *Walker*.

[60]258 U.S. 181 (1922)

[61]Id. at 189-190. The Court did seem to recognize in *Howat* that a defendant could challenge the jurisdiction of the court issuing the injunction in a contempt proceeding. 258 U.S. 181 (1922) at 189.

[62]388 U.S. at 321.

[63]See *New York Times v. Starkey*, 380 N.Y.S. 2d 239, 51 A.D. 2d 60 (1976), to be discussed infra. See also Goodale, 509-510.

[64]388 U.S. at 318-319. The Court assumes that appeals courts are available to expeditiously consider prior restraint orders preventing the press from publishing timely information. But that is not always the case. In *Dickinson, Nebraska Press*, and other cases, the period of time between the injunction and reversal on appeal was many months.

[65]Justice Warren wrote: "Having violated the injunction, they (petitioners) promptly submitted themselves to the courts to test the unconstitutionality of the injunction and the ordinance it parroted. They were in essentially the same position as persons who challenge the constitutionality of a statute by violating it, and then defend the ensuing criminal prosecution on constitutional grounds. It has never been thought that violation of a statute indicated such a disrespect for the legislature that the violator must be punished even if the statute was unconstitutional. On the contrary, some cases have required that persons seeking to challenge the unconstitutionality of a statute first violate it to establish their standing to sue. Indeed, it shows no disrespect for law to violate a statute on the ground that it is unconstitutional and then submit one's case to the courts with the willingness to accept the penalty if the statute is held to be valid." Id. at 327. In a dissent joined by Chief Justice Warren and Justices Douglas and Fortas, Justice Brennan wrote: "By some inscrutable legerdemain these constitutionally secured rights to challenge prior restraints invalid on their face are lost if the State takes the precaution to have some judge append his signature to an *ex parte* order which recites the words of the invalid statute....Were it not for the *ex parte* injunction, petitioners would have paraded first and challenged the permit ordinance later. But because of the *ex parte* stamp of a judicial officer on a copy of the invalid ordinance they are barred not only from challenging the permit ordinance, but also the potentially more stifling yet unconsidered restraints embodied in the injunction itself." 388 U.S. at 346-347. And in language unusually harsh for him, Brennan added: "The Court today lets loose a devastatingly destructive weapon for infringement of freedoms jealously safeguarded not so much for the benefit of any given group...as for the benefit of all of us." Id. at 349.

[66]465 F. 2d. at 499.

[67]Id.

[68]*Stewart v. Dameron*, 321 F. Supp. 886 (E.D. La., 1971).

[69]*Stewart v. Dameron*, 448 F. 2d 396 (5th Cir. 1971) After the decision by the Fifth Circuit, the district court judge held a *Younger v. Harris* hearing, 401 U.S. 37 (1971), limited solely to the question of whether the state prosecutorial motive was legitimate or contrived. 465 F. 2d at 500. This hearing also resulted in a holding for the state. The Fifth Circuit again reversed with the case remanded for another evidentiary hearing, *Stewart v. Dameron*, 460 F. 2d 278 (5th Circ. 1972).

[70]465 F. 2d at 500.

[71]Id.

[72]Id.

[73]Id.

[74]The court essentially cited six reasons for its decision. First, the court held that for First Amendment freedoms to be abridged the "substantive evil must be extremely serious and the degree of imminence extremely high." 465 F. 2d 505, quoting *Bridges v. California*, 314 U.S. 252, 263 (1941). See, e.g. *Craig v. Harney*, and *Pennekamp v. Florida* . Second, the present case was in no way a "Roman Holiday" or "carnival atmosphere" such as the trial in *Sheppard v. Maxwell*, 384 U.S. 333 (1966). Third, the public's right to know the facts in this case was "particularly compelling here, since the issue being litigated was a charge that elected state officials had trumped up charges against an individual solely because of his race and political civil rights activities." 465 F. 2d at 508. Fourth, the district court's order was not directed at any named party or court official in the case, but rather it sought to control activities of "non-parties to the lawsuit -- namely, two reporters -- in matters not going to the merits of the substantive issues of the ongoing trial." Id. at 508. Fifth, the appeals court held that while the district court's effort to protect the accused was "laudable," it put the federal judge in the role of "policing the climate of the community to insure a sterile trial in the state court." The state courts, the Fifth Circuit held, are "no less capable of protecting the defendants' constitutional rights...than is a federal court." Id. at 508. Finally, the appeals court held that there are "alternative cures for prejudicial publicity far less disruptive of constitutional freedoms than an absolute ban on publication." Id. at 508.

[75]Id. at 509.

[76]Id. at 509. Emphasis in original. See, *U.S. v. United Mine Workers*, 330 U.S. 258 (1947); *Howat v. Kansas*, 258 U.S. 181 (1922); *Gompers*

v. Buck's Stove and Range Co., 221 U.S. 418 (1911).

[77]Id. at 509, quoting *Southern Railway Co. v. Lanham*, 408 F. 2d 348, 350 (5th Cir. 1969).

[78]Id. at 509-510. (emphasis in original).

[79]Id. at 510.

[80]Id. at 510. See *Shuttlesworth v. City of Birmingham; Thornhill v. Alabama*, 310 U.S. 88 (1940); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[81]See, e.g., *Becker v. Thompson*, 459 F. 2d 919 (5th Cir. 1972); *Boyle v. Landry*, 401 U.S. 77 (1971).

[82]*Watkins v. U.S.*, 354 U.S. 178, 197 (1957).

[83]465 F. 2d at 511.

[84]Id. at 510.

[85]Id. at 510, quoting 221 U.S. at 450. Judge Brown noted even in *New York Times v. U.S.*, 403 U.S. 713 (1971), no justice, including Black and Douglas, suggested that the injunctions could be ignored with impunity, even though they held that "every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment," 403 U.S. at 715; but no one suggested that the New York Times or Washington Post should have violated the order. That meant, according to Judge Brown in *Dickinson* "an assumption that courts may punish as contempt violations of even its unconstitutionally defective orders infringing freedom of the press underlies the *Times* decision." Id. at 511.

[86]Id. at 511.

[87]388 U.S. at 318.

[88]Id. at 512.

[89]Id. at 512.

[90]Id. at 512. It is significant that although Judge Brown acknowledged the need for expeditious appeal, there was a period of nine months between the time of the original contempt citation and the appellate court decision.

[91]See *Malloy v. Hogan*, 378 U.S. 1 (1964); *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385 (1920); *Gelbard v. U.S.*, 408 U.S. 41 (1972).

[92]465 F. 2d at 512.

[93]The court also noted that both the district court and the court of appeals were available and could have been contacted the very day that the order was issued, thereby affording "speedy and effective but *orderly* review of the injunction in question swiftly enough to protect the right to publish news while it was still 'news'". Id. at 512. (emphasis in original).

[94]Id. at 513. In discussing the nature of contempt, the court suggested that "contempt may well be the last vestige of the so-called 'common law crimes', insofar as a determination that particular conduct should be punished as contempt depends not so much on specific prohibited acts having occurred as on the Judge's subjective determination that the conduct was culpable, blameworthy and deserving of punishment." Id. at 513. But, in citing *Donovan v. City of Dallas*, 377 U.S. 408 (1964), the court noted that a case can be remanded to the trial court for the judge to decide, in light of the appeals court's determination that the original order was unconstitutional, that the contempt citation was now also invalid. In *Donovan*, the Texas Court of Civil Appeal determined that the contempt judgments were "inappropriate" in view of the Supreme Court pronouncement that the restraining orders were unlawful. 465 F. 2d at 514. See, e.g., *Dunn v. U.S.*, 388 F. 2d 511 (10th Cir. 1968).

[95]349 Supp. 227 (1972)

[96]476 F. 2d 373 (1973); *cert. denied*, 414 U.S. 979 (1973).

[97]349 Supp. at 228. And he added, "I deem it inappropriate in this case for me to try to imitate the proverbial catfish who could talk out of both sides of his mouth and whistle all at the same time." Id. at 228.

[98]Id. at 228-229. Judge West added that "it would be difficult to conceive of a court issuing an order, knowing it to be invalid and having the audacity to cite a person for contempt for disobeying it." Id. at 229.

[99]See *Craig v. Harney;* and note 3 supra. Also referred to as "indirect criminal contempt," constructive contempt involves activities that interfere with the proper functioning of the courts but do not take place in the presence of the court or "so near thereto" to create an obstruction of administration of justice. See *Toledo Newspaper Co. v. U.S.*, 247 U.S. 402 (1918); *Nye v. U.S.*, 313 U.S. 33 (1941).

[100]The court of appeals' decision was a short, per curiam opinion which said in part: "Although the Court has power to adopt a position different from that of the earlier appeal, we are not persuaded that such action is required in this cause. It is to be noted that the appellants did not seek a rehearing or make application for certiorari of the decision on the prior appeal." 476 F. 2d at 374.

[101]See *Ginzburg v. U.S.*, 383 U.S. 463 (1966).

[102]See *In re Providence*, 820 F. 2d at 1353-1354 n. 75 for a discussion of the articles proclaiming the newspaper's disobedience.

[103]497 F. 2d 102 (1974).

[104]497 F. 2d 107, 110 (1974).

[105]Id. at 103-104.

[106]Id. at 103.

[107]Id. The order was first issued in written form in the show-cause order in the contempt proceeding. Id. n 1. The trial judge shortly thereafter issued two more orders related to sketching. They were intended in part to supplement the local rules applicable in district court which "proscribes radio and TV broadcasting from the courtroom." Id. at 103 n. 3. The last order stated that "sketching in the courtroom or its environs, whether or not the court is actually in session, is prohibited. This order extends to and prohibits the publication of any sketch...regardless of the place where such sketch is made." Id. at 103-104. After a trial by the same judge, CBS was found guilty of criminal contempt and fined $500.

[108]Id. at 104, quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947). The court of appeals also recognized that the Kaufman Committee Report, a study undertaken by a group of judges to implement the free press/fair trial mandate of *Sheppard v. Maxwell*, did not recommend "any direct curb or restraint on publication by the press of potentially prejudicial material. Such a curb...is unwise as a matter of policy and poses serious constitutional problems." 45 F.R.D. 391, at 401-402.

[109]See, e.g., *Estes v. Texas*, 381 U.S. 532 (1965); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Rideau v. Louisiana*, 373 U.S. 723 (1963).

[110]497 F. 2d at 106.

[111]Of the eighty federal district courts that have written rules, only three have provided, as suggested in the Kaufman Committee Report, that in certain"widely publicized cases" the court may direct that "no sketch be made of any juror within the environs of the court." 45 F.R.D. 410-411. American Bar Association Canon 35 would not permit in-court sketching, but only two states have adopted that provision. And in one of them, New Jersey, the state supreme court decided that the ban should be lifted. *In re Application of National Broadcasting Co.*, 64 N.J. 476, 317 A. 2d 695 (1974).

[112]497 F. 2d at 106.

[113]Id. at 107.

[114]*U.S. v. CBS*, 497 F. 2d 107 (1974).

[115]Id. at 109. During the contempt trial, the judge's secretary, law clerk and a local reporter were called as prosecution witnesses to testify on the question of the original verbal orders. On the issue of orders issued orally, see *Jamason v. State*, 447 So. 2d 892 (Fla. App. 4 Dist. 1983), where a judge, responding to a habeas corpus petition, ordered police by telephone to bring the petitioner before her. The police, while acknowledging that they knew it was the judge making the call, refused to comply. By the time the written order arrived, the prisoner had been turned over to the county jail. The Florida court of appeal, in upholding the contempt conviction of the police department and the $500 fine, said the case posed the difficult question of when unwritten orders are valid. But citing *Dickinson*, the court held that the police should have complied. Id. at 896.

[116]Id. at 109.

[117]Id. at 110. No subsequent trial was held. In *Angelico v. State of Louisiana*, 593 F. 2d 585 (5th Cir. 1979), a television reporter was convicted of criminal contempt, and fined $500 or 30 days in jail, for allegedly blocking an exit of the courthouse in attempting to interview a grand jury witness. After exhausting his state remedies without success, the appellant brought a habeas corpus petition in federal district court. The court of appeals rejected the state's contention that *Dickinson* required the sustaining of the contempt conviction even though the rules governing use of cameras in the courthouse were unconstitutionally vague, and reversed the contempt conviction. The court of appeals held that the case was different from *Dickinson* because unlike in that case where the defendants understood their activities were prohibited, in *Angelico* "the rules were so vague that Angelico could not reasonably anticipate that his acts fell within their ambit. We feel the violation of the rules was inadvertent." Id. at 589.

[118]607 F. 2d 120.

[119]Id. at 123.

[120]Id. at 124. The appellants' confinement was suspended pending appeal. At 126.

[121]Id. at 125.

[122]This paper will discuss the development of the law related to the collateral bar rule and the First Amendment only in Washington and California. Other states that have developed standards relating to the rule include Illinois, Arizona, Massachusetts and Alabama. See, *Cooper v. Rockford Newspapers*, 365 N.E. 2d 746 (1977); *Phoenix Newspapers v. Superior Court*, 418 P. 2d 594 (1971) and *State v. Chavez*, 601 P. 2d 301

(1979); *Fitchburg v. 707 Main Corp.*, 343 N.E. 2d 149 (Mass. 1976); and *Ex parte Purvis v. Local Union No. 1317*, 382 So. 2d 512 (Ala. 1980).

[123]483 P. 2d 608, 79 Wash. 2d 69 (1971).

[124]*Mead School District No. 354 v. Mead Ed. Ass'n*, 534 P. 2d 561 (1975).

[125]Id. at 609. The order provided among other things, that: "No Court proceedings shall be reported upon or disseminated to the public by any form of news media, including, but not limited to newspaper, magazine, radio and television coverage, except those proceedings occurring in open Court in the presence of the Judge, jury, court reporter, defendants and counsel for all parties. No report shall be made by such news media in any event of matters or testimony ruled inadmissible or stricken by the trial judge at the time of the offer of the matter or testimony." Id.

[126]Id.

[127]Id. at 609-610.

[128]Id. at 611. For another case where reporters were barred from a trial after disobeying a restraining order, see *Oliver v. Postel*, 282 N.E. 2d 306 (Ct. of Appeals NY, 1972).

[129]Id. at 611. The issue of "transparently invalid" orders was examined in detail in *In re Providence Journal*, to be discussed infra.

[130]Id.

[131]Id. The Washington court struck down the order as an unconstitutional prior restraint which violates the First Amendment to the U.S. Constitution. "Appellants' principal assignment of error concerns the question of whether a newspaper may constitutionally be proscribed in advance from reporting to the public those events which occur during an open and public court proceeding. Limiting our opinion to the facts at hand, we hold that it may not." Id. at 612.

[132]Id. at 613. The court understood the judge's efforts to insure a fair trial, but held: "The trial court's earnest effort to secure and maintain a fair trial...resulted in a deprivation of the appellants' constitutional right to report to the public what happened in the open trial. If restraints upon the exercise of First Amendment rights are necessary to preserve the integrity of the judicial process, then those restraints must be narrowly drawn. The limitations imposed cannot be greater than is necessary to accomplish the desired constitutional purpose. That is not what occurred here." Id. at 613.

[133]Id.

[134]534 P. 2d at 563.

[135]*Mead School District v. Mead Education Ass'n.*, 85 Wash. 2d 140, 530 P. 2d 302 (1975).

[136]Id.

[137]*Dike v. Dike*, 75 Wash. 2d 1, 8, 448 P. 2d 490, 495. (1968).

[138]*State v. Olsen*, 54 Wash. 2d 272, 274, 340 P. 2d 171, 172 (1959), quoting 12 A.L.R. 2d 1059, 1066 (1950).

[139]*United States v. United Mine Workers*, 330 U.S. 258 (1947); United *States v. Shipp*, 203 U.S. 563 (1906).

[140]534 P. 2d at 564.

[141]Id.

[142]Id.

[143]Id. at 565. The court noted that the case would be different "had the contempt orders been designed to benefit the plaintiff rather than vindicate the power of the court." Quoting Justice Frankfurter's concurring opinion in *United States v. United Mine Workers*, the Washington Supreme Court wrote: "Only when a court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities may (its order) be disobeyed and treated as though it were a letter to a newspaper." 330 U.S. at 309-310.

[144]The court also reduced the fine from $1,000 to $100, holding that the trial court violated a state law limiting punishment for contempt in certain cases to $100. Id. at 567.

[145]In a dissenting opinion, Judge Finley criticized the majority's viewpoint that an unconstitutional order can support a contempt citation. Taking issue with the jurisdictional questions considered by the court, he wrote, "I am convinced that a contempt order should have no higher or greater validity than the injunction upon which it is based....By the laws of nature, water cannot rise above its source. The contempt power, if not for reasons of natural law, at least for common-sensical reasons should not be elevated to a higher order of things simply as a dubious prophylaxis for a dubious affront to the dignity of the court. Since the injunction has been set aside and is of no effect, any contempt orders based upon it should also be set aside and given no legal effect." Id. at 568-569.

[146]679 P. 2d 353, 101 Wash. 2d 364 (1984).

[147]Id. at 355.

[148]The defendant's attorneys had argued that public broadcast of the tapes would cause his client a mental breakdown, and two psychiatrists testified to that effect before the judge issued the order. When the stations asked the prosecutor for the tapes which had already been admitted into evidence, the

prosecutor agreed to provide them on the condition that the tapes not be aired before they were played in open court. The stations complied with this condition. Id. at 355.

[149]Id. at 357.

[150]Id.

[151]Id.

[152]Id. at 358.

[153]Id. at 358 n. 3. In *U.S. v. Holland*, 552 F. 2d 667 (5th Cir. 1977), the court of appeals reversed the contempt conviction of an inmate who refused to provide samples of his writing to determine his involvement in a scheme to alter postal money orders. Because the inmate had not been charged with any offense, no subpoena had been issued requiring him to testify before a grand jury, and no indictment had been returned nor information filed, the district court lacked jurisdiction to require him to furnish samples of his handwriting. After being convicted of criminal contempt, the appellant was sentenced to six months, the sentence to be consecutive to any sentence earlier imposed on him. Id. at 671. Rejecting the state's contention that *Dickinson* required the contempt citation to stand, the court concluded that because the district court had no jurisdiction to make the order for the handwriting samples, the appellant cannot be punished for contempt. Quoting *Ex Parte Fisk*, 113 U.S. 713, at 718 (1885), the court wrote: "When...a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void." Id. at at 675.

[154]Id. at 359.

[155]Id. at 359.

[156]Id. at 360. Article 1, section 5 of the Washington Constitution states: FREEDOM OF SPEECH. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

[157]Id. at 364. The court added: "Our holding today that prior restraint of certain speech, like secret 'star chamber' trials and mandatory submission of advance newspaper copy for court approval is among the long list of tools that are not constitutionally available to courts to protect defendants' rights in no way reduces the trial courts' responsibilities in this regard." Id. at 364.

[158]Id. at 365.

[159]Id. at 365-368. The concurring opinion stated in part: "The majority uncritically views the issue as an open and shut prior restraint case. This analysis not only ignores much of the recent criticism of the prior restraint doctrine...it also infringes upon the goal of open communication. Id. at 368. See e.g., Jeffries, "Rethinking Prior Restraint," 92 *Yale L. Rev.* 409 (1983); and Mayton, "Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment and the Costs of the Prior Restraint Doctrine, 67 *Cornell L. Rev.* 245 (1982).

[160]436 P. 2d 273 (1968).

[161]Id. at 279. The California Supreme Court concluded: "The order...is so broadly drawn as to include within its reach activities fairly within the protection of constitutional guarantees of free speech and expression." Id. at 285. See *Thornhill v. Alabama*, 310 U.S. 88 (1940).

[162]Id. at 280.

[163]Id.

[164]Id. at 281.

[165]Id. at 282.

[166]Id.

[167]438 F. Supp. 10 (N.D. California, 1977).

[168]Id. at 11-12. They were sentenced to five days in jail and a fine of $500, with the judgments of contempt stayed pending the district court's decision. The petitioners had exhausted all state appeals. Id. at 12.

[169]Id. at 13. The trial court held that the ad encouraged striking unions and others to "ignore the court orders and escalate their efforts." Id. at. 12-13, 17. But the federal district court stated that the ad "simply urged the Board of Supervisors to negotiate by engaging in collective bargaining." Id. at 18.

[170]323 U.S. 516 (1945).

[171]Id. at 14.

[172]Id. at 18.

[173]809 F. 2d 63, decided December 31, 1986.

[174]Alex S. Jones, "Court Cites Paper on Publishing Ban," *New York Times* (March 19, 1986), p. 11. The article ran in the *Providence Journal* on November 14, 1985.

[175]Id. The FBI also released the information to WJAR-TV and other news organizations. 809 F. 2d at 65. The FBI had originally refused to turn over the information to the *Journal* on the grounds that disclosure would be an unwarranted invasion of personal privacy. The *Journal* brought suit in federal district court seeking to compel disclosure, *Providence Journal Co. v. FBI*, 460 F. Supp. 762 (D.R.I. 1978), losing in both district court and appellate court, which ruled that the FBI was

within its discretion to refuse the *Journal's* request. *Providence Journal Co. v. FBI*, 602 F. 2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071.

[176]Id. The *Journal* was served with the complaint on November 12, 1985, and argued that any restraining order would constitute a prior restraint forbidden by the First Amendment. 820 F. 2d at 1345.

[177]Id.

[178]Fed. R. Crim. P. 42(b).

[179]630 F. Supp. 993.

[180]Id. at 1345. See also, "Newspaper Fined By Federal Judge," *New York Times* (April 3, 1986), p. 11. Judge Boyle was quoted in the *Times* as saying: The newspaper had "chosen to violate an appropriate court order and boldly communicate that defiance to hundreds of thousands of residents in this area." The judge arrived at the decision of what penalty to impose based on circulation. The newspaper's average daily circulation, 200,000, was multiplied by 50 cents. The judge derived that figure, according to the Associated Press, by adding 15 cents per copy of estimated advertising revenues to the 35-cent per copy price. "Judge fines Rhode Island paper $100,000 for contempt," *The Seattle Times* (April 3, 1986), p. A7. The next day the judge granted an indefinite stay of the fine and suspended sentence so the newspaper could appeal. "Judge Delays Fine to Let Newspaper File Appeal," *New York Times* (April 4, 1986), p. 8.

[181]820 F. 2d at 1344.

[182]Id. at 1345.

[183]Id. at 1349. One of the grounds on which Patriarca asserted the request for injunction relief was the Fourth Amendment. The court held that the "Fourth Amendment protects citizens from abuses by the government, not from actions of private parties." Id. at 1350.

[184]Id. at 1351.

[185]Id.

[186]Id. at 1346-1347; 388 U.S. at 315.

[187]Id. at 1347. See 3 Wright, Federal Practice & Procedure, Section 702 at 815 n. 17 (1982). The court of appeals said that because *Walker* involved speech and conduct, as opposed to *Providence*, involving "pure speech," the two cases were clearly distinguishable. Id. at 1348.

[188]Id. at 1347.

[189]The court said: "As a general rule, if the court reviewing the order finds the order to have had any pretense to validity at the time it was issued, the reviewing court should enforce the collateral bar rule." Id. at 1347. The court also noted that there may be a number of reasons why such an order would be issued: "We pause to note that the existence of a transparently unconstitutional order does not indicate an improper motive or incompetence. To the contrary, any number of factors including a short deadline, an excessive workload on the court, or the poor presentation of the issues by the parties can lead the court to issue an order that would not have been issued in the absence of the exigent circumstances." Id. at 1348 n. 31.

[190]Id. at 1351. The court noted that counsel for the Journal were notified less than 24 hours before they were to present their arguments.

[191]Id. at 1353.

[192]Id. at 1347. The court of appeals did explain in a lengthy footnote that in reversing the contempt conviction, "we in no way condone their conduct." The court criticized the newspaper for using the court order to "bolster the importance of the Patriarca story." with such headlines as "Court restricts media use of FBI tapes on Patriarca; Journal decides to print." The court noted that the newspaper, by publishing a day before the scheduled hearing and by not seeking expedited appellate review, the Journal "invited a confrontation." And the court added: "It appears to this court that the Journal published the story concerning the court order more for its publicity value than for its news value." Id. at 1353-1354 n. 75. Judge Boyle's decision to hold the newspaper and its editor in contempt generated some press comment, including thoughtful observations made by New York Times columnist Anthony Lewis, one of the foremost writers on the law and the Supreme Court. Despite a strong commitment to the First Amendment, Lewis supported the contempt convictions, saying that if people ignore court orders in the belief that they will later be found invalid, the system would not work. Lewis recognized that individuals may have to violate statutes to test their validity, but added:

"Injunctions have always been treated differently in the federal courts. That may be because they are directed specifically to individuals. Or it may be because of a feeling that we need finality somewhere in the system. In any event, violation of an injunction is almost always contempt, even if the injunction is later set aside." "The Civilizing Hand," *New York Times* (April 7, 1986), p. 19.

Lewis said there may be occasions when such disobeyance is necessary, and he gave the example of a court trying to stop a story from being published on the eve of an election, and no appeal were

possible. But he added, "It is hard to see what urgency, or what policy, required The Providence Journal to rush that story into print without appealing."
Others did not see the case as involving First Amendment issues. Laurence H. Tribe, a Harvard Law School professor of constitutional law was quoted as saying, "It's a case of the power of the judiciary to punish violators of its orders...Violating a restraining order is a punishable offense, even if the restraining order is later determined to be illegal. It appears to be a clear-cut case of violating the order, not a constitutional conflict." "Newspaper Fined by Federal Judge," *New York Times*, (April 3, 1986), p. 11. See also, "Court Throws Out Contempt Ruling Against Paper," *New York Times* (January 1, 1987), p. 8.

193*In re Providence Journal*, 820 F. 2d 1354 (1987). Five of the six judges of the court joined the per curiam opinion. Judge Selya did not concur in the en banc opinion on the grounds that the "court should hold a hearing and decide the case anew after full briefing and argument." At 1354.

194The court wrote: "Not only would such entail time and expense, but the right sought to be vindicated could be forfeited or the value of the embargoed information considerably cheapened." At 1354-1355.

195Id. at 1355. See also, "Stuart Taylor, Jr., "High Court, Short A Member, Starts To Set Its Agenda," *New York Times* (October 6, 1987), p. 1.

196Id. The en banc opinion noted that only about eight hours elapsed between the issuance of the order by the district court and the deadline for publication. And it added: "Not only are we left without a clear conviction that timely emergency relief was available within the restraints governing the publisher's decision making, but we would deem it unfair to subject the publisher to the very substantial sanctions imposed by the district court because of its failure to follow the procedure we have just announced." Id. at 1355.

197Id. at 1354.

198Id.

199See, e.g., *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

200418 U.S. 323.

201See R. Labunski, "Pennsylvania and Supreme Court Libel Decisions: The 'Libel Capital of the Nation' Tries To Comply," 25 *Duquesne Law Review* No. 1 (Fall, 1986). See also, R. Labunski, note 4, supra.

202See note 3, supra.

203See *Goldblum*, note 2, supra.

204This is what the en banc opinion in *Providence* seemed to recommend. 820 F. 2d 1354 (1987).

205See Goodale, note 29, supra.

206380 N.Y.S. 2d 239 (1976).

207The judge ordered reporters for several newspapers "not to go into any background at all." The New York Times printed an article referring to a previous trial and conviction of the defendants. The judge stated that if there were any further violations of the order, he would hold those responsible in contempt. Id. at 241-242.

208Id. at 242.

209The appellate court criticized the trial judge for failing to conduct an inquiry into whether the publicity was of such a pervasive nature that a fair trial might be prevented through the publication of prejudicial publicity. And it noted, "no such inquiry of this character was made by the court; nor indeed that any findings were declared on the record establishing that the ultimate resort to the restrictions on the press were justified under the circumstances." Id. at 244.

210In *Starkey*, the appeals court noted that New York State law provided for expedited appeals in cases involving the press during a pending trial. See *Oliver v. Postel*, supra, and *La Rocca v. Lane*, 376 N.Y.S. 2d 93.

211See *New York Times Co. v. U.S.*, 713 U.S. 403 (1971), where the dissenters bitterly complained about the lack of time to fully consider the constitutional issues in the case.

212365 N.E. 2d 746 (1977).

213Id. at 751.